85-1425

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Supreme Court, U.S.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

REPUBLICAN PARTY OF
HAWAII, TORAKI
MATSUMOTO and RUDY
PACARRO,

Appellants,

vs.

PATSY MINK,
MARILYN BORNHORST and
RAYMOND K. PUA, CITY
CLERK, CITY AND COUNTY
OF HONOLULU,

Appellees,

APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is it permissible for a Court sua sponte to conjure up important governmental interests in an effort to satisfy the test in Anderson v. Celebrezzee, 460 U.S. 780 (1983), interests which the State Court asserts justify an absolute ban on an official who has been recalled in a no fault recall election from running to fill the vacancy caused by the recall, when no such governmental interests whatsoever were advanced by the government or by any other litigant?

2. If it is permissible for the Hawaii Supreme Court on its own to create such "governmental interests", what are the due process implications where Appellants were first confronted with those alleged

"governmental interests" only when the Court issued its written opinion after already having entered its judgment?

3. If it is permissible for the Hawaii Supreme Court on its own to create "governmental interests" to justify the ban on Appellants' running in the special election, was the Hawaii Supreme Court correct with respect to the following:

   a. Was the Hawaii Supreme Court correct in its determination that a complete an on Appellants' running in the special election is an injury of "virtually no character or magnitude"?

   b. Was the Hawaii Supreme Court correct when it suggested that the mere possibility of being elected by a

plurality in the special election justifies banning Appellants from running in that election?

c. The Hawaii Supreme Court suggests that unless the electorate is prevented from voting for previously recalled official, the process of recall has no efficacy because they might be re-elected. Is "because you might win the election" a legitimate reason to ban someone from running for an office?

d. The Hawaii Supreme Court states that the implicit ban which it finds in the Charter is a "general one and must be construed so as to apply to all vacancies, no matter how created." Does the Court-imposed need for a ban on running after

impeachment justify a ban on running after a no-fault recall?

4. Does an Emergency Petition for Writ of Mandamus predicated solely upon State law and Motion to Dismiss the Emergency Petition for Writ of Mandamus wherein Respondent Councilmembers in the State Court proceeding raised the Federal constitutional issue in their Motion to Dismiss without expressly waiving their right to return to Federal Court constitute voluntary and full litigation of their Federal constitutional claim under England v. Medical Examiners, 375 U.S. 411 (1964) and Government Employees v. Windsor, 353 U.S. 364 (1957)*

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*The Respondents in the State Court proceeding

were Toraki Matsumoto, Rudy Pacarro and Raymond K. Pua, City Clerk, City and County of Honolulu. The Intervenor below was Republican Party of Hawaii. Petitioners below were Patsy Mink and Marilyn Bornhorst, in their official capacity as councilmembers of the City and County of Honolulu, State of Hawaii on behalf of themselves and all other voters of the City and County of Honolulu.

28 U.S.C. sec. 2403 (b) may be applicable and therefore, service shall be made upon the Attorney General of the State.

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IN THE SUPREME COURT
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OCTOBER TERM, 1985

NO.

REPUBLICAN PARTY OF
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Appellants,

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APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii is reported at 68 Haw. ___,

___ P.2d ___ (1985) and is set forth in the Appendix infra, pp. A-1 - A-15. (hereinafter "App. A ").

JURISDICTION

This is an appeal from an Original Proceeding for a Writ of Mandamus commenced in the Supreme Court of the State of Hawaii.

Appellees Patsy Mink and Marilyn Bornhorst filed an Emergency Petition for Writ of Mandamus in the Supreme Court of the State of Hawaii on November 20, 1985. Appellants Toraki Matsumoto and Rudy Pacarro moved to dismiss the Petition on November 25, 1985. The Hawaii Supreme Court entered its Order Granting Writ of Mandamus on November 26, 1985. App. A-16 - A-18. That Order constitutes a final judgment or decree within

the meaning of 28 U.S.C. § 1257. Appellants filed their Notice of Appeal to the Supreme Court of the United States with the Supreme Court of the State of Hawaii on November 27, 1985. App. A-19 - A-23. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1257(2).

CONSTITUTION AND STATUTES AND ORDINANCES INVOLVED[1]

U.S. CONST. amend. I

U.S. CONST. amend. XIV, art. 1.

42 U.S.C. § 1983

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[1] The Constitutional provisions, statutes and ordinances are set forth in their entirety in the App., infra, A-30 - A-41.

Sections 3-102, 3-105(b), 12-103, 12-201 and 12-202 of the Revised Charter of the City and County of Honolulu 1973 (1983 edition).

STATEMENT OF THE CASE

Toraki Matsumoto and Rudy Pacarro served as Democratic Councilmen on the Honolulu City Council for seventeen and fifteen years respectively. Running as Democrats in the last general election, Matsumoto faced only token opposition and Pacarro ran unopposed. Their public support is substantial. For the last twenty years the Democratic Party has been overwhelmingly the dominant party in Hawaii much like the Democratic Party was in the Old South. *De facto* the Republican Party is a minor party in Hawaii.

In 1984, Honolulu voters elected a Republican mayor for the first time in 20

years. In May of 1985, Matsumoto, Pacarro and a third councilman, George Akahane, changed their party affiliation from Democrat to Republican. After joining with the two existing Republican members of the City Council, they created a five person Republican majority on the nine member City Council. For the first time since World War II the Republicans controlled both the Mayor's office and the City Council. The new Republican majority ousted Patsy Mink as chairperson of the Council. In June, 1985, Patsy Mink mobilized the Democratic Party machine in a recall effort aimed at the three new Republican councilmen.

Recall of elected city officials is governed by Sections 12-101 through 12-103 of

the Revised Charter of the City and County of Honolulu 1973 (1983 edition) ("Charter" or "RCH"). App. A-32 - A-38. The Charter permits "no-fault" recall, i.e., there need be no misfeasance, malfeasance, or non-feasance. In that regard, Honolulu's recall law is unusual. The only basis for the recall asserted in the recall petitions was the change in party affiliation from Democrat to Republican. In July, 1985 petitions bearing an apparently sufficient number of signatures to satisfy the Charter requirements (10% of the votes cast in the district in the last council election) were submitted to Appellee Raymond Pua, the City Clerk. The petitions were accepted and certified by Pua and the recall election was set for October 5, 1985.

On August 12, 1985, Matsumoto, Pacarro and Akahane filed a complaint in the U.S. District Court for the District of Hawaii (Civil No. 85-0950) challenging the constitutionality of a part of section 12-103 of the Charter which was viewed by all as the only restriction in the City Charter on running for office after recall:

> No person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation.

Although focused on what was viewed to be the only Charter restriction on running again for City Council, the complaint generally attacked the constitutionality of

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

restrictions on running for office after recall. The District Court entered its "Decision and Order" on September 3, 1985 in which , although Judge King characterized the two year ban on running for office as "Draconian" and the two year ban on appointive office as "especially capricious", he felt that the constitutional problems raised by the two year ban would not be ripe unless one of the three councilmen lost the recall election. While retaining jurisdiction and declining to abstain, the District Court left disposition of the constitutional claim to await the results of the October 5, 1985 recall election.

On Saturday, October 5, 1985, all three councilmen were recalled, Pacarro by 81 votes out of 13,280 votes cast and Matsumoto

by 958 votes out of 16,891 votes cast.

The next Monday, October 7, 1985, the recalled councilmen renewed their request for the U.S. District Court to rule on the constitutionality fo the two year ban. On October 15, 1985, the District Court sitting en banc (Senior Judges Pence and Judge King with Chief Judge Harold Fong) filed its "Decision and Order Denying Temporary Restraining Order," Judge Fong dissenting, which was subsequently clarified as a denial of Plaintiffs' request for a preliminary injunction. In issuing their decision, they sidestepped the constitutional question altogether.

On October 18, 1985, Judge Fong's vigorous dissent was filed. In his dissent

Judge Fong addressed the "balancing test" announced by this Court in Anderson v. Celebrezzee, 460 U.S. 780, 788-89 (1983) (hereinafter "Anderson") and, after concluding that the two year ban was likely to be found unconstitutional, upon application of that test, he stated that he would have granted the injunction.

Pacarro, Matsumoto and Akahane appealed the denial of their injunction to the Ninth Circuit Court of Appeals on October 23, 1985. On October 24, 1985, they filed a Motion for Injunction Pending Appeal. Following argument on October 25, 1985, Circuit Judges Kennedy, Hug and Skopil entered an Order on October 28, 1985 in which they concluded that the two year ban was so likely to be unconstitutional that its enforcement should

be enjoined. The October 28, 1985 Ninth Circuit Order was reduced to a formal opinion on November 4, 1985. Matsumoto, et al. v. Pua, et al., 775 F.2d.1393 (1985). In that opinion at 1395-96, the Ninth Circuit recognized that Matsumoto and Pacarro would suffer irreparable injury if they were to be denied the right to run in the special election, and it subsequently developed that they were entitled to run. The Ninth Circuit Court reached its conclusion after analyzing the two year ban in terms of the "balancing test" found in Anderson, supra, 460 U.S. at 788-89. The Court addressed the only governmental interest anyone had raised to justify the two-year ban on running for City office after recall; i.e., that a ban would

promote officeholder responsiveness to the electorate. Rejecting that argument the Court found that such an interest is served by recall itself. 775 F.2d at 1397.

On October 29, 1985, the District Court entered an "Order Granting Plaintiffs' Motion for Preliminary Injunction" enjoining City Clerk Raymond Pua from refusing to place Plaintiffs' names upon the ballot by relying upon the two-year penalty provision. On that same day, which was the last day to file nomination papers to run in the special election, Toraki Matsumoto and Rudy Pacarro filed to run in the special election to regain their lost seats. Although provided for in the statute, no one filed an administrative challenge to the filing and acceptance of their nomination forms, and

their names were printed on the ballots. The election was scheduled for November 30, 1985.

On October 31, 1985, the Democratic Party of Hawaii filed a new Complaint in the State trial court (First Circuit Court) alleging that even though the ban was unenforceable, nevertheless the City Charter should be interpreted to find an implicit ban on recalled officials running in any election held during the balance of the term to fill the positions from which they were recalled. The Democratic Party's Motion for Temporary Restraining Order seeking to enjoin the mailing of absentee ballots containing the names of Matsumoto and Pacarro was heard on November 5, 1985 and was denied by the trial court on November 7, 1985.

That same day, the Democratic Party of Hawaiil filed a Motion for Preliminary Injunctive and Declaratory Relief in the state court and informally asked for the trial on the merits to be set for the next day even though the complaint was only eight days old. Not surprisingly the trial court declined to set the case for trial the next day. No formal request was made to the trial court for a more reasonable early trial date. Only four hours after filing their Motion for Preliminary Injunction in the trial court, the Democratic Party of Hawaii filed a Petition for Writ of Mandamus in the Supreme Court of the State of Hawaii seeking a writ to compel the lower court to try the case immediately. Two hours later they asked the State Supreme Court for an ex parte

Temporary Restraining Order ("TRO") which was granted without hearing on Friday, November 14, 1985. The TRO enjoined Pua from mailing the absentee ballots containing Matsumoto's and Pacarro's names.

The recusal of Justice Wakatsuki (Democratic Majority Leader in the State House of Representatives for several years), Justice Hiyashi (close relative of Democratic Governor Ariyoshi's wife) and Chief Justice Lum (former high ranking official in the Democratic Party of Hawaii) was suggested. All but Justice Wakatsuki declined to recuse themselves.

A motion to dissolve the TRO was filed and following argument on November 18, 1985, the Hawaii Supreme Court "conditionally"

dissolved the TRO by requiring sua sponte that a notice, which no party to the proceeding has asked for, be mailed with each ballot

> "...to the general effect that the eligibility of the applicable recalled councilmember (Respondents Matsumoto and Pacarro as the case may be) as a candidate for election is in litigation, and that the candidate's name could be ordered stricken from the ballot by the court."

Matsumoto and Pacarro moved to Dismiss the Petition and delete the requirement of mailing of "warning notices" with the absentee ballots. The Hawaii Supreme Court apparently recognized that the "notice" requirement which the Court had imposed on its own also raised serious procedural, constitutional and practical problems which would likely invalidate the entire election

and that a writ of mandamus to compel the lower court to try the case immediately could not properly be issued when no formal request first had been made to the trial court. The Court dismissed the Petition for Writ of Mandamus on November 19, 1985, thereby also disposing of the "notice" requirement.

Throughout these proceedings Appellees Patsy Mink and Marilyn Bornhorst had been initimately involved although not as named parties. On November 20, 1985, Mink and Bornhorst filed an "Emergency Petition for Writ of Mandamus." Unlike the Democratic Party, Mink and Bornhorst did not seek a writ directed to the trial court to have it decide the charter interpretation issue which was then pending before it. Instead they ignored the pending trial court action and asked the

Hawaii Supreme Court to interpret the City Charter so as to read into it an implicit ban on recalled officials running for the office from which they were recalled during the unexpired portion of their original term.[2] Petitioners then asked the Court, based upon the brand new interpretation of the City Charter to issue a Writ of Mandamus ordering Pua to delete the names of Pacarro and Matsumoto from the ballots for the special election which was then scheduled to be held on Nov. 30, 1985.

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[2] The statutory interpretation urged by Appellees was not that which ultimately was adopted by the Hawaii Supreme Court. As is discussed below, at the time of the argument the Court created a different theory altogether and then adopted it a half hour later.

On November 26, 1985, the Supreme Court granted their petition, although for a reason completely different thant that raised in the brief.

On December 2, 1985 Appellants returned to U.S. District Court where they were Plaintiffs in the still pending action originally filed on August 12, 1985 in which the constitutional issue had first been raised in the context of a two year ban on running for any City office after recall. (Matsumoto et al. v. Pua et al., Civil No. 85-0950). Relying on England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1965), Matsumoto and Pacarro filed a motion for partial summary judgment on the question of the constitutionality of the new interpreted-into-existence city charter ban against

Matsumoto and Pacarro running for city council in the special election. After an expedited hearing the morning of December 4, 1985 Judge Harold Fong of the U.S. District Court issued his "Order Denying Motion for Partial Summary Judgment", App. A-24 -A-27. The District Court held that it lacked jurisdiction to decide the constitutional question because the Court felt the Hawaii Supreme Court had addressed the constitutional issue "either expressly or sub silentio". Since the written decision of the Hawaii Supreme Court wasn't filed until late that same afternoon, the District Court didn't actually know the rationale for the Hawaii Supreme Court's decision. In the District Court's view, notwithstanding England, Matsumoto's

and Pacarro's only remedy was a direct appeal to this Court.

In an abundance of caution, Appellants elected to proceed simultaneously in both this Court and the U.S. Court of Appeals for the Ninth Circuit. In its Order filed December 12, 1985, the Ninth Circuit Court declared that the district court had not erred in its jurisidictional interpretation. App. A-28 - A-29.

THE QUESTIONS RAISED BY THIS DIRECT APPEAL ARE SUBSTANTIAL

I. THE INTERPRETED-INTO-EXISTENCE BAN ON RUNNING IN THE SPECIAL ELECTION VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

By this appeal Messrs. Matsumoto and Pacarro seek a determination by this Court that the Hawaii Supreme Court's interpre-

tation of the City Charter results in a constitutionally impermissible infringement upon the rights of Matsumoto and Pacarro to be candiates for the City Council and also violates the First Amendment rights of the electorate, their supporters. Alternatively this appeal seeks a determination by this Court that the U.S. District Court for the District of Hawaii has jurisdiction to decide the constitutionality of the interpreted-into-existence ban on appellants running for City Council. This is a classic case of the exception to the general rule that actual controversy must exist at the stage of appellate review. This candidacy case is truly "capable of repetition, yet evading review" Roe v. Wade, 410 U.S. 113, 125 (1973);

Southern Pacific Terminal Co. V ICC, 219 U.S. 498, 515 (1911).

As will be seen, this appeal presents in as pure and clean a factual and procedural context as possible the following question of candidate ballot access never before decided by this Court which impacts directly upon, and if resolved by this Court will provide needed guidance to, every state and municipality which permits recall elections:

> When an official has been recalled in a recall election prompted only by a change in the official's political party affiliation (not by any misfeasance or malfeasance in office - i.e. a no-fault or "for no cause" recall), can the official constitutionally be barred from running in the special election called to fill the vacancy created by the recall?

This appeal also will give this Court the opportunity to flesh out its holding in

Anderson v. Celebrezze, 460 U.S. 780 (1983). In that decision this Court called for a balancing test to judge the constitutionality of candidate ballot access restrictions. The second step of the balancing process requires the government to identify the precise governmental interests which justify the imposition of the restriction. Neither the government nor any other litigant identified any governmental interest which justified the absolute prohibition against Appellants Toraki Matsumoto and Rudy Pacarro running in the special election. The Hawaii Supreme Court sua sponte did so in its opinion. App. A-12 » A-13.

This Court has decided that the right to run for office is not a fundamental one. Bullock v. Carter 405 U.S. 134, 142-143

(1972); Clements v. Fashing, 457 U.S. 957, 963 (1982). However, the right to equal access in voting is a fundamental right, Harper v. Virgina State Board of Election, 383 U.S. 663 (1966); and candidacy restrictions implicate First Amendment rights of voters as well as of candidates. Lubin v. Panish, 415 U.S. 709, 716 (1974), Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983). A restriction on candidacy may therefore heavily burden the fundamental right to vote. Lubin v. Panish, 415 U.S. 709, 716 (1974).

> The exclusion of candidates from the ballot infringes on the voters' freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like minded citizens.

Anderson v. Celebrezze, 460 U.S. 780, 788-89

(1983). The Anderson case is the most recent decision by this Court touching on the constitutionality of restrictions on candidate access to the ballot. In that case this court announced a three part "balancing test" to be used to determine the constitutionality of restrictions on a candidate's access to the ballot:

1. Consider the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights caused by the restriction.
2. Identify and evaluate the precise interests put forward by the state to justify the restriction and determine the legitimacy and strength of those interests.
3. Consider the extent to which those interests make it necessary to burden the potential candiate's rights.

A. CHARACTER AND MAGNITUDE OF INJURY

In their Opinion, App. A-11, the Hawaii Supreme Court addressed the first part of the Anderson test and concluded,

> ...it seems clear to us that there is virtually no character or magnitude to the asserted injury to their rights that respondents Matsumoto and Pacarro seek to assert. They ran for office knowing they were subject to recall.

The Hawaii Supreme Court seems seriously to be suggesting that somehow one waives the right to contest the constitutionality of a statute if they are aware of its before they run for office. Obviously appellants knew of the recall provisions when they ran for office, but whether or not they knew they could be recalled is not the issue. When they ran for City Council neither they nor anyone else suspected that the Hawaii Supreme Court would interpret the word "successor" in

section 3-105(b) of the Charter so as to preclude a recalled official from running in the special election. But knowledge of a prohibition on running for city office after a not the issue. The issue is whether or not a ban on running for office after a "no-fault" recall injures appellants. Running for office even with knowledge of the existence of a ban on running after recall does not mean there is no injury if an unconsitutional ban is enforced. Whether or not Appellants knew they could be recalled is simply irrelevant to whether or not a ban on running for an office after recall is unconstitutional. The Hawaii Supreme Court seriously takes the position that the degree of injury to one's constitutional rights is related to the amount of forewarning one has.

The contention is irrational. It is nothing more than a post hoc rationaliazation in an effort to justify the Court's decision in light of the Anderson tests.

Is not a complete ban on running in an election, whether special, primary or general, about as far as government can go in restricting one's access to the ballot? By definition is that not an injury of the most serious character and of the greatest magnitude possible to the candidate and to rights of the voters?

B. IDENTIFY AND EVALUATE THE PRECISE INTERESTS PUT FORWARD BY THE STATE TO JUSTIFY THE BALLOT ACCESS RESTRICTION

The Hawaii Supreme Court's efforts to rationalize its decision into compliance with the second part of the Anderson balancing

test fares no better. This part of the Anderson balancing test requires the Court to identify and evaluate the precise interests put forward by the state (or in this case City Clerk Pua or Petitioners Mink and Bornhorst) to justify the restriction on Appellants' access to the ballot.

In accordance with Rule 13.1 of the Rules of the Supreme Court of the United States, Appellants have requested the Clerk of the Hawaii Supreme Court to certify and transmit the entire record before the Hawaii Supreme Court. Nowhere in that record will this Court find any governmental interest advanced by any of the parties to justify the imposition of a prohibition on Appellants running in the special election. Instead, the Hawaii Supreme Court in its opinion sua

sponte conjured up governmental interests which the Court felt might constitutionally legitimze its "interpretation" of the Charter. Seeing as how these "interests" emerged for the first time in the opinion of the Hawaii Supreme Court, the decision of that Court should not be given res judicata effect since Appellants never had a full and fair opportunity to litigate the validity of these "governmental interests". See, Robinson v. Ariyoshi, 753 F.2d 1468, 1472 (9th Cir. 1985). The decision of the Hawaii Supreme Court concerning these "governmental interests" having been rendered sua sponte without affording Appellants an opportunity to be heard with respect to such interests denied Appellants their procedural due pro-

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ss rights. Robinson v. Ariyoshi, 441 Supp. 559, 580 (D. Haw. 1977) affirmed in levant part, 753 F.2d 1468, 1471-1473 985); Sotomura v. County of Hawaii, 402 Supp. 95, 99 (D. Haw. 1975). The procedu- l due process implications of the Hawaii preme Court's creation of "governmental terests" to justify its decision where none re advanced by the litigants, should alone rrant reversal or at least make it clear at the U.S. District Court has jurisdiction decide the constitutional question after e parties have had an opportunity to liti- te the issues.

Upon examination, the merits of the recise interests" created by the Hawaii preme Court to justify its decision fail to tand up under even casual scrutiny. The

first such "interest" ". . . is to give the citizens a right by a majority vote to recall councilmen for whatever reason the citizens may deem appropriate." App. A-12. The Hawaii Supreme Court is confused. Being able to run in the special election in no way infringes upon the citizens' right to recall. The recall election was held, and Appellants were recalled. That process was over. Being able to run in the special election to fill the vacancy after the recall doesn't affect the recall itself one way or another. The only purpose of recall is to recall and it is not necessary to inflict punishment on those who lose a "no-fault" recall election in order to effectuate that purpose.

This is not a term limitation case.

Clearly limitations on the number of terms one can hold an office are constitutionally permissible. However in this case there is no distinction whatsoever between appellants and every other registered voter in their districts, each of whom could run for city council, except that appellants lost an election. The electorate exercised their right of recall, and a prohibition on running in the special election is analytically irrelevant to the exercise of the right to recall.

The Hawaii Supreme Court goes on to suggest in this connection: "If respondents Matsumoto and Pacarro could run again, the people would be required to reject them twice in order to have them out of office for the remainder of the term from which they were recalled." App. A-12 - A-13 (footnote omit-

ted). That argument assumes appellants would lose the subsequent election. What important governmental interest is there in denying the voters the opportunity to decide whether or not they want appellants back in office in preference to all the other candidates now that they see the alternatives available?

Although said in reference to the two year ban, the words of the Ninth Circuit on this point are equally applicable to the interpreted-into-existence ban at issue here:

> The City Charter does not require a showing of malfeasance in office to initiate recall election. Indeed, all parties to the present action agree that the three councilmen were removed from office by an announced change in political philosophy, not any mealfeasance in office. It is highly doubtful that political processes are in any way advanced by preventing an officeholder who is removed from office by a vote of

> *the people because of an unpopular decision from seeking any elective office for two years. Public views of issues and candidates change. The elective process is designed to reflect the changing views of the people*.

75 F.2d at 1397 (emphasis added). What the awaii Supreme Court really seems to fear is he possibility that a recalled official ight win the special election by a plurali- y. By law, a plurality is all it takes to e elected, and with the large number of andidates running in the special election it s likely that whether or not appellants run, he winner will be by a plurality vote. What s the important governmental interest in reventing Appellants from being elected by a lurality? To suggest that the government as an interest in denying the electorate an pportunity to vote for Appellants in the

special election because appellants might get elected makes no sense.

The Hawaii Supreme Court next suggests that their interpreted-into-existence ban is a general one which also applies to those who resign or are impeached and somehow that constitutes a governmental interest. App. A-13. But is the purpose of a ban on running for office after a no-fault recall in any sense the same as a ban on running after impeachment? Obviously not. The need for a ban on impeached officials running again for the same office is obvious.[3] The need for such a ban when an official resigns from office is dubious. However, assuming that a ban on an impeached official running again is

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[3] The Charter does not contain such a ban. See App. A-39 - A-41.

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essary, that doesn't justify (or more
rectly, make constitutional) a ban on an
icial who is recalled in a "no-fault"
ction from running for the office again.
ike impeachment which is a judicial deci-
n, a no-fault recall is, after all, only a
itical decision by the electorate. There
no justification possible for punishing
ellants merely because they lost an elec-
n which was purely a political event.

If the interpreted-into-existence ban on
nning is so broad that its dragnet includes
an on running after no-fault recall,
her the whole "general" provision is void
at least as applied to Appellants it must
void for being overbroad.

Finally, the Hawaii Supreme Court

suggests that a ban on Appellants' running:

> "...is necessary to accomplish the Revised Charter's purpose of letting the citizens decide whether or not to recall a councilman. The process of recall by a majority and reelection by a plurality which respondents urge, could, given the time limitations expressed in Section 12-103 of the Revised Charter. . . be repeated several times during the second and third years of councilman's four year term"

App. A-13 - A-14. The first sentence just quoted is no more than a restatement of the Court's previous "interest": ". . . the interest of the City and County as expressed in the Charter, is to give the citizens a right by a majority vote to recall councilman for whatever reason the citizens may deem appropriate." App. A-12. The argument becomes no more logical or compelling by being repeated. Recall is one thing, the special election is another. Holding a

special election in no way interferes with the holding of the recall election. A ban on Appellants running in the special election has no effect one way or the other on the conduct or outcome of the recall election.

As for the second sentence quoted above, the argument is specious. The reality is that the two year ban would have prevented too frequent recalls/special elections. However, with the enforcement of the two year ban being enjoined because of its apparent unconstitutionality, the problem of too frequent recall only arises because of the statutory "gap" created by the deletion of the two year ban. The remedy is to close the gap legislatively, not to use the existence of the gap resulting from the unenforcabiltity

of an unconstitutional provision to justify the judicial imposition of still another ban.

Moreover, assume that someone other than the recalled official is elected in a special election in the second or third year of a term, nothing in the Charter would prevent the immediate recall of the newly elected councilperson or of their "successor" and so on for the next two years. Thus the same speculative problem of repeated recalls posed by the Hawaii Supreme Court in an effort to justify its decision would exist whether or not Appellants can run in the special election.

II. THE HAWAII SUPREME COURT'S CHARTER INTERPRETATION CONTRAVENES THE INJUNCTION ISSUED BY THE U.S. DISTRICT COURT

Section 3-102 of the City Charter provides:

> The Council shall consist of nine members... The terms of office of councilman shall be four years beginning at twelve o'clock meridan on the second day of January following their election. (Emphasis supplied).

The recall provisions of the City

rter Sec. 12-103, provide, in part:

> If a majority of the registered voters who vote on the question at a recall election shall vote "Yes," the elected officer shall be deemed recalled and removed from office, otherwise he shall remain in office. (Emphasis supplied).

Democratic Party, in the proceedings in

U.S. District Court, in the action it

ed in the state trial court and also in

unsuccessful petition for writ of manda-

to the Hawaii Supreme Court as well as

itioners Mink and Bornhorst in their suc-

sful Petition for Writ of Mandamus which

to this appeal all argued that these two

charter provisions should be interpreted to mean that if one is recalled from office, the recall is for "the term of the office", and therefore the recalled official cannot run again for the office from which he or she was recalled for the unexpired balance of the original term of that office. All of the cases cited by the Democratic Party, Mink and Bornhorst in support of such an interpretation dealt with removal for cause, not a no-fault recall. This Court should have it firmly in mind that this interpretation of the Charter was the one which was raised, briefed and argued by Petitioners Mink and Bornhorst, and therefore it was the only one to which Appellants responded. It is important for this Court to understand that the

Hawaii Supreme Court interpreted the statute on an entirely different basis, one of its own manufacture which was entirely different from that argued by Appellees Mink and Bornhorst in their petition and which had never been briefed by any of the parties.

As discussed _supra_, the Hawaii Supreme Court also created on its own "governmental interests" to try to justify constitutionally its interpretive ban on Appellants running in the special election. The Hawaii Supreme Court has often been called to task for deciding matters on a basis not before it without giving the litigants a chance to address the basis for its decision. In _Robinson v. Ariyoshi_, 753 F.2d 1468, 1472 (9th Cir. 1985) the Ninth Circuit Court of Appeals refused to give res judicata effect to a Hawaii Supreme

Court conclusion where the complaining party did not have a full and fair opportunity to litigate the claim in state court, citing Haring v. Prosise, 462 U.S. 306 (1983). In an earlier decision in the same controversy the Hawaii Supreme Court rendered a decision sua sponte on an issue as to which the parties had never been given an opportunity to be heard. The U.S. District Court for Hawaii found this to be a denial of procedural due process. Robinson v. Ariyoshi 441 F.Supp. 559, 580 (D.Haw. 1977):

> The state court violated not only its own rules, but the state law as well, by deciding the case on issues that were never raised or argued.

In Sotemura v. County of Hawaii, 402 F.Supp 95 (1975) the Hawaii Supreme Court in its opinion formulated a new presumption of law

concerning the location of seaward property boundaries not raised by the litigants. Because the Court neglected to allow the parties to address the new presumption, the U.S. District Court found that where the parties were never afforded an opportunity to contest the new presumption of law by the presentation of argument and evidence, the Hawaii Supreme Court had "transgressed the due process clause of the Fourteenth Amendment" id at 99, citing Brinckerhoff-Faris Co. v. Hill, 281 U.S. 673, 677-81 (1930).

The idea of construing the word "successor" in Section 3-105(b) of the Charter never arose until oral argument when out of the the blue Justice Padgett asked the meaning of the word "successor". Section 3

105(b) of the Charter, (App. A-34), provides in relevant part:

> A vacancy in the office of any councilman shall be filled in the following manner:
>
> * * *
>
> (b)... At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. (emphasis added)

Justice Padgett seized upon the use of the word "successor" in Section 3-105(b) as necessarily meaning that one can never succeed himself or herself, and therefore Matsumoto and Pacarro could not run in the special election to fill the vacancy created by their recall. Two points need to be made. First, if the issue of the meaning of "successor" in the Charter had arisen in the pleadings, Appellants would have had an opportunity to research and brief the matter.

Appellants would then have been able to point out to the Court that the language of section 3-105(b) of the Charter was carried over unchanged from the 1959 Charter which had no recall provision at all for city councilmen. This indicates that the use of the term "successor" was never originally intended to apply to recall. Appellants also would have been able to point out a definition in Black's Law Dictionary, (4th ed.) which would support a less restrictive interpretation than the definition from Black's used by the State Court:

> successor: one who has been appointed or elected to hold an office after the term of the present incumbent.

The point is, with the Court deciding on a basis not raised or briefed, Appellants cannot be said to have been given procedural due

process.

The second and more important point is that when the Charter was written and adopted, what the electorate intended was clearly stated in the two year ban found in Sec. 12-103: A recalled elected official could not run for a city office for two years after being recalled, whether the election was a general, primary or special election and regardless of the office sought. Since that clearly was the intention, even if the word "successor" as used in Section 3-105(b) of the Charter has the restricted meaning found by the Hawaii Supreme Court, the use of the word "successor" reflects no more than linguistic consistency with the assumption that a recalled official would not be running

again for City office for two years. However because of the constitutional infirmities of the two year ban, its enforcement was enjoined.

It is important to keep in mind that the state statutory interpretation question referred to by the U.S. District Court and the Ninth Circuit was not the same interpretation as that which the Supreme Court itself devised as the basis for its decision. For the Hawaii Supreme Court to seize upon the use of the word "successor" in Section 3-105(b) to create a new ban on running when that word merely reflects an assumed state of affairs resulting from the two year ban, the enforcement of which has been enjoined, is no more than an end run around the preliminary injunction issued by the U.S. District Court.

Since it de facto contravenes that injunction, the Hawaii Supreme Court's order should be overturned.

III. IN THE ALTERNATIVE, THE DISTRICT COURT PROPERLY HAS JURISDICTION TO DECIDE THE CONSTITUTIONAL QUESTION

Although this case is not technically an abstention case, the practical effect of all of the proceedings to date is the same. The usual abstention case involves a federal court challenge to a state statute on constitutional grounds with the federal court abstaining to allow the plaintiffs to file an action in state court first to obtain an interpretation of the statute which might avoid constitutional infirmities. This Court's holding in Government Employees v. Windsor, 353 U.S. 364 (1957) requires that

the federal constitutional implications be raised in the state court proceedings so that the statute will be construed ". . . in light of the constitutional objections. . . " id at 366. Following the state court decision, unless the plaintiffs go beyond Windsor and "fully litigate" the federal constitutional issue in state court, as the court held in England v. Medical Examiners, 375 U.S. 411 (1964), Plaintiffs have an absolute right to return to federal court to litigate the federal constitutional questions in light of the state court's interpretation of the statute.

In this case, Matsumoto and Pacarro on August 12, 1985 filed an action in federal court challenging the constitutionality of the two year prohibition on running for city office after being recalled. The two year

ban found in Section 12-103 of the charter was the only charter provision explicitly preventing them from running for city council in the forthcoming special election. The Ninth Circuit found the two year ban to be so constitutionally suspect that its enforcement was ordered to be enjoined. Matsumoto, et al. v. Pua et al. 775 F.2d at 1397-98.

On at least five separate occasions both in the U.S. District Court and in the Ninth Circuit the Democrats urged the same construction of the charter which Mink and Bornhorst sought in an effort to prevent Matusmoto and Pacarro from running in the special election. Both federal Courts declined to address the argument noting that it was a state law question and in any event the

charter was required to be interpreted "as it was written, not as it might have been written." Id., 775 F.2d at 1397. At that point in time Matsumoto and Pacarro were on the ballot and were quite content to go through with the election. Therefore unlike the usual abstention case there was not formal abstention followed by plaintiffs bringing an action in state court. Instead there was refusal of the federal courts to entertain the Defendants' proferred interpretation followed by the Defendants bringing an action in state court. When they failed to obtain interlocutory relief in the trial court, the Democratic Party unsuccessfully sought a Writ of Mandamus to compel the lower court to have an immediate trial on the merits. When the Democratic Party failed, their privys, Appel-

lees Mink and Bornhorst tried again this time seeking a writ directed to city clerk Pua to delete the names of Matsumoto and Pacarro from the ballot.[4] In their memorandum in support of their Motion to Dismiss the Petition Appellants pointed out and explained why the charter construction proposed by Mink and Bornhorst would violate the First and Fourteenth Amendments to the U.S. Constitution. Government Employees v. Windsor, 353 U.S. 364 (1957) requires a litigant to inform the state court "what his federal claims are, so that the state statute may be construed 'in light of' those claims". England v. Medical

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[4] That a Writ of Mandamus does not lie to undo what has already been done or to reverse discretion already exercised was simply ignored by the Hawaii Supreme Court when they granted the writ.

Examiners, 375 U.S. at 420 explaining the holding in Windsor. That was done. Since the constitutional issue was not raised anywhere in the case in chief and was not in any sense a part of the case in chief as conceived and filed by the Pettioners themselves, no explicit reservation of the right to fully litigate the federal constitutional question in the pending federal action seemed necessary. In any event, "Such an explicit reservation is not indispensable. . . ." England v. Medical Examiners, supra, 375 U.S. at 421:

> [T]he litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. (Emphasis added; footnote omitted).

Although not an abstention case, it seems that the logic and holdings of England and Windsor dictate that since the federal constitutional objections were not "fully litigated" in the state court action which was, after all, a summary proceeding for writ of mandamus, Appellants Matusmoto and Pacarro may fully litigate those issues in U.S. District Court in their already filed and pending action.

If the constitutionality of Sections 3-102 and 3-105 as interpreted by the Supreme Court was specifically at issue and had been fully briefed and argued by the Parties, including the City Clerk and Republican Party Intervenor and decided by the Hawaii Supreme Court, the District Court would not have subject matter jurisdiction over the issue.

District of Columbia v. Feldman, 460 U.S. 462 (1983); Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985). However, as the Ninth Circuit noted in Robinson, supra, at 1471-72 wherein the Federal Appellate Court examined an Hawaii Supreme Court decision:

> However, Rooker [Rooker v. Fidelity Trust Co., 263 U.S. 415 (1923)] made it clear that the only constitutional questions arising from a state proceeding on which the Supreme Court considered itself to be the final arbiter, were those that 'actually arose in the cause' in which a full hearing was held and where the judgment was responsive to the issues. ... Otherwise if Rooker were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, Rooker would swallow the 'full and fair opportunity to litigate' limitation to res judicata clearly established elsewhere by the Supreme Court.

No full and fair opporutunity to

litigate the federal constitutional claims was provided to the parties in the truncated writ proceedings. As commented upon favorably by this Court in Robinson, supra, 753 F.2d at 1472:

> [T]he Restatement of Judgments... provides for an exception to the general rule of preclusion where '[a] new determination in quality or extensiveness of the procedures followed in the two courts...'Restatement (Second) of Judgments Sec. 28(3)> (Emphasis added).

An emergency writ couched solely in state law terms, responsive pleadings by City Clerk and Republican Party addressing the state law issue, notification to the State Court by Plaintiffs of the federal constitutional claims, order granting the writ by court solely addressing the charter provisions show the difference in quality and extensiveness

of procedure which should be accorded these serious federal claims.

If Appellants had not raised the federal constitutional problems before the Hawaii Supreme Court, to allow that court to interprete the statute in light of those objections, Windsor would require a remand for that purpose. However, since Appellants did raise the constitutional objections and the Hawaii Supreme Court interpreted the statute "in light of" those objections, it should not be, as the U.S. District Court seems to think, that Appellants only remedy is a direct appeal to this Court.[5] What

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[5] This procedural whipsaw seems to be exactly what this Court sought to avoid in its decision in England v. Medical Examiners 375 U.S. 411, 418 when this Court said:

> . . . litigants shunted from federal

happened is exactly what Windsor requires and under such circumstances England is clear that Appellants have a right to return to Federal Court.

> Thus mere compliance with Windsor will not support a conclusion, much less create a presumption, that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court.

England, 375 U.S. at 420. This Court already has acknowleged that "There are fundamental objections to any conclusion that a litigant who has properly invoked the jursidiction of a Federal District Court to consider federal

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Footnote 5 (cont.) to state courts by application of the abstention doctrine will not be exposed... to procedural traps operating to deprive them of their right to a District Court determination of their federal claims."

constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." England 375 U.S. at 415.

CONCLUSION

Appellants urge this Court to recognize the "governmental interests" created by the Hawaii Supreme Court to justify its decision in terms of the Anderson balancing test for what they are: after the fact, shallowly focused, insubstantial, circular and utterly unconvincing.

The Hawaii Supreme Court has interpreted-into-existence a complete ban on Appellants running the special election. A complete ban on running for an office is as

substantial a restriction on ballot access as there can be. Accordingly a rather compelling state interest is necessary to justify the restriction. See, Consumer Party v. Davis, 606 F.Supp. 1008, 1019 n.18 (D.Pa. 1985) applying the Anderson test.

> The principal reflected in the Anderson approach is that if a burden on First Amendment associational and voting rights cannot be justified by important state regulating interests, the state regulation is invalid.

Stoddard v. Quinn, 593 F.Supp. 300, 307 n.12 (D.Me. 1984) It would seem that none of the so-called "interests" asserted by the Hawaii Supreme Court are "important" and in some cases upon analysis aren't even logical, much less compelling. Since they are the basis for justifying the Hawaii Supreme Court's interpreted-into-existence ban on Appellants

running in the special election, that ban should be stricken as an unconstitutional infringement on Appellants' and the voters' First and Fourteenth Amendment rights.

Alternatively, Appellants suggest that jurisdiction may properly rest with the U.S. District Court for the District of Hawaii.

Respectfully submitted,

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Counsel of Record

George L. Dyer, Jr.
Attorney for Appellant
Republican Party of Hawaii

Cynthia H.H. Thielen
Attorney for Appellants Toraki
Matsumoto and Rudy Pacarro

APPENDIX

IN THE SUPREME COURT OF THE STATE OF HAWAII

---o0o---

PATSY MINK and MARILYN BORNHORST, in their official capacity as Council members of the City and County of Honolulu, State of Hawaii on behalf of themselves and all other voters of the City and County of Honolulu, Petitioners, v. RAYMOND K. PUA, and RUDY PACARRO, Resondents, and REPUBLICAN PARTY OF HAWAII, Intervenor

No. 10998

(ORIGINAL PROCEEDING)

DECEMBER 4, 1985

LUM, C.J., NAKAMURA, PADGETT, HAYASHI, JJ., AND INTERMEDIATE COURT OF APPEALS ASSOCIATE JUDGE TANAKA IN PLACE OF WAKATSUKI, RECUSED

ELECTIONS - Revised Charter of the City and County of Honolulu - Eligibility of Recalled Councilmen to be Candidates to Fill the Vacancy Created by their Recall.

Under Section 3-105(b) of the Revised Charter of the City and County of Honolulu, councilmen who are recalled are ineligible to run as candidates to fill the vacancy created for their unexpired term by their

recall.

CONSTITUTIONAL LAW - Article I, section 8, Constitution of the State of Hawaii - Revised Charter.

The disqualification, by the Revised Charter of the City and County of Honolulu, of recalled councilmen from running for the vacancies created by their recall, does not violate Article I, section 8 of the Constitution of the State of Hawaii.

SAME - First and Fourteenth Amendments to the Constitution of the United - States - disqualification of recalled councilmen.

The disqualification, by the Revised Charter of the City and County of Honolulu, of recalled councilmen from running to fill the vacancies created by their recall, does not, on application on the balancing test set forth in Anderson v. Celebrezze, infringe upon their rights under the First and Fourteenth Amendments to the Constitution of the United States.

OPINION OF THE COURT BY PADGETT, J.

On Tuesday, November 26, 1985, we issued an order directing respondent Raymond K. Pua, Clerk of the City and County of Honolulu, to take appropriate action pursuant to HRS Sec. 11-117(b) to carry into effect our ruling that respondents Toraki Matsumoto and Rudy Pacarro were disqualified to run in the special election held to fill their unexpired terms as a result of their having been recalled. In that order, we noted that a written opinion would follow. This is that opinion.

Respondents Matsumto and Pacarro were recalled when a majority of voters, voting on the question of their recall at a special election held for that purpose, voted in favor of the recall.

The recall election was held pursuant to Sections 12-102 and 12-103 of the Revised Charter of the City and County of Honolulu.

Section 12-103 provided in part:

> No person who has been removed from his elected office or who has resigned from such office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the City within two years after his removal or resignation.

Pursuant to the direction of the United States Court of Appeals for the Ninth Circuit, the United States District for the District of Hawaii enjoined respondent Pua from refusing, on the basis of the provisions just quoted, to place the names of respondents Matsumoto and Pacarro on the ballot to elect the persons to fill the unexpired terms from which they had been recalled.

The question of whether, under other provisions of the Re-ised Charter, the recalled councilmen were eligible to run in the special election to fill their unexpired terms was not dealt with in the injunction.

When a vacancy in the office of councilman occurs, the special election to fill that vacancy is held pursuant to the provisions of the Revised Charter of the City and County of Honolulu, Section 3-105(b), which provides as follows:

> Vacancy in Office - A vacancy in the office of any councilman shall be filled in the following manner:
>
> . . . .
>
> (b) If the unexpired term is for one year or more, the vacancy shall be filled by special election to be called by the council within ten days and to be held within sixty days after the occurrence of the vacancy. At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. If any special or general election is to be held in the city after thirty days and within one hundred eighty days after the occurrence of the vacancy, then the election shall be held in conjunction with such other election.

The above provision, by its terms, is a general one, providing for the filling of any vacancy, whether resulting from death, disability, resignation, recall,

impeachment or because the councilman has moved out of his district. The key word in that section is the word "successor" and it necessarily must mean the same in all cases of vacancies, no matter how they occur.

The definition of "successor" in Black's Law Dictionary at 1283 (5th ed. 1979) begins:

> One that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession.

In 83 C.J.S. Successor at 770 (1953), it is stated:

> The term "successor" is variously defined as meaning he that followeth, or cometh in another's place; one that succeeds or follows; one who follows another into a position; one who succeeds or takes the place of another; one who succeeds to the rights or place of another; one who takes the place of a predecessor or preceding thing; one who takes the place which another has left, and sustains the like part or character; also, a person who has been appointed or elected to some office after another person.

See also 40A Words and Phrases (1964)

beginning at page 20.

Thus, the usual meaning of the word "successor" is one who takes the place of another. No one has pointed to anything in the Charter, or in the history leading up to the adoption thereof, which would indicate an intention to depart from that oridinary meaning of the word "successor" in Section 3-105(b).

On the other hand, it is difficult to conceive that the Charter was intended to allow, for example, an impeached councilman, or a councilman who had resigned, to run to fill the vacancy created by his or her impeachment or resignation. In such situations, the common sense of construing "successor" to mean what it oridinarily means and thus to bar the impeached or resigned councilman from running to succeed himself or herself is obvious.

We see no reason why the ordinary

signification of the word "successor" should not be used with respect to one who fills a vacancy created by a recall election. A recalled councilman, by the special recall election, has had one opportunity to have the question of his or her continuance in office voted upon by the people. We find no evidence, in the Charter, of an intention to give him or her a second.

Respondents Matsumoto and Pacarro contend that our construction of the Revised Charter violates Article I, section 8 of the Constitution of the State of Hawaii, which provides:

> No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

Clearly, Matsumoto and Pacarro have not been disfranchised by the provisions of the Charter.

State and local governments have

obvious and legitimate interests in provisions limiting an office holder's right to reelection or reappointment. Thus, for example, we have a constitutional provision which limits the number of consecutive terms a governor may serve. Article V, section 1, Constitution of the State of Hawaii. We also have statutory provisions which limit the number of years an appointee to administrative boards may serve. HRS Sec. 26-34. The persons who take office, knowing of those requirements and accept them, are subject to such requirements. They thus are not deprived of any of the rights or privileges secured to other citizens except by the law of the land.

Respondents Matsumoto and Pacarro also argue that our construction of the Charter is contrary to the First and Fourteenth Amendments to the Constitution of the

United States under Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

In that case a third party candidate, for President of the United States, did not get his papers filed with the proper Ohio officials by a March deadline. Under that statute, major party candidates did not have to file at that early date.[1]

In that case, the Supreme Court of the United States said:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from

---

[1] The majority opinion in Anderson noted that the State's interest in political stability was adequately vindicated by another statute prohibiting a defeated candidate in a party primary from running as an independent. 460 U.S. at 783, 103 S.Ct. at 1567, 75 L.Ed.2d at 554. That provision is much closer to the Charter provisions of which respondents Matsumoto and Pacarro are complaining than the statute struck down in Anderson.

> invalid restrictions. [Citations omitted.] Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

d. at 789, 103 S.Ct. at 1570, 75 L.Ed.2d at 58.

Applying that test, it seems clear to us hat there is virtually no character or agnitude to the asserted injury to their ights that respondents Matsumoto and Pacarro eek to assert. They ran for office knowing hey were subject to recall. A recall etition was duly circulated, signed and

erified. A recall election was held as rovided by statute. They lost by a majority ote of those voting on the issue of their ecall. They now seek to be reelected to the ffice from which they have been vacated, oping that, because there is no primary lection as a forerunner to the special lection to fill the vacancy, they may now be lected by a plurality less than a majority nd thus vitiate the will of the people xpressed in the recall election.

Secondly, the interest of the City and ounty, as expressed in the Charter, is to ive the citizens a right by a majority vote o recall councilmen for whatever reason the itizens may deem appropriate. If espondents Matsumoto and Pacarro could run gain, the people would be required to reject hem twice in order to have them out of ffice for the remainder of the term from

which they were recalled.[2] Moreover, the provision with respect to vacancies is, as we have pointed out above, a general one and must be construed so as to apply to all vacancies, no matter how created. This adds another interest on the part of the City and County of Honolulu in barring recalled councilmen, along with resigned and impeached councilmen, from running to fill the vacancies created by their disqualification from office.

Thirdly, the disqualification is necessary to accomplish the Revised Charter's purpose of letting the citizens decide whether or not to recall a councilman. The process of recall by a majority and reelection by a plurality which respondents urge, could, given the time limitations

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[2] A provision expressly allowing recalled councilmen to run could have been included in the Charter if that was what was wanted. It was not.

expressed in Section 12-103 of the Revised Charter of the City and County of Honolulu, be repeated several times during the second and third years of a councilman's four-year term.

The people of the City and County of Honolulu adopted the Revised Charter. They had the right to provide for the recall of their elected officials and they likewise had the right, within constitutional limitations, to create thereby a mechanism which would prevent the frustration of that right. This they have done, and their interest in so doing outweighs any possible impingement upon the interests of respondents Matsumoto and Pacarro to run again to fill their own vacancies. We find no constitutional impediment to the enforcement of the Charter provisions as we have construed them.

We therefore hold that a recalled councilman is ineligible to run in the

special election to fill the remainder of his or her unexpired term. Our previous judgment of disqualification stands.

/s/ Herman T.F. Lum
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Frank D. Padgett
Yoshimi Hayashi
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Republican Party of Hawaii

NO. 10998

IN THE SUPREME COURT
OF THE STATE OF HAWAII

PATSY MINK and MARILYN) ORIGINAL
BORNHORST, in their) PROCEEDING
official capacity as)
Councilmembers of the)
City and County of)
Honolulu, State of) Filed
Hawaii, on behalf of) Nov. 26, 1985
themselves and all)
other voters of the)
City and County of)
Honolulu,)
)
Petitioners,)
)
vs.)
)
RAYMOND K. PUA, City)
Clerk, City and County)
of Honolulu, TORAKI)
MATSUMOTO, and RUDY)
PACARRO,)
)
Respondents.)
)
and)
)

REPUBLICAN PARTY OF)
HAWAII,)
)
Intervenor.)
)

ORDER GRANTING WRIT OF MANDAMUS

Upon consideration of the petition for writ of mandamus filed herein, the responses thereto, and the arguments of counsel, and the record, the court holds that respondents Toraki Matsumoto and Rudy Pacarro, having been recalled at a duly held election, are disqualified by the provisions of Sections 3-102 and 3-105 of the Revised Charter of the City and County of Honolulu from being candidates to succeed themselves at the special election to fill the remainder of their unexpired terms.

An opinion of the court setting forth

the basis for this holding will follow in due course, but in view of the fact that the election is presently scheduled for November 30, 1985,

IT IS HEREBY ORDERED that respondent Raymond K. Pua, Clerk of the City and County of Honolulu, take appropriate action with respect to said disqualifications pursuant to HRS Sec. 11-117(b).

DATED: Honolulu, Hawaii, November 26, 1985.

/s/ Herman T.F. Lum
Edward H. Nakamura
Frank D. Padgett
Yoshimi Hayashi
Harry T. Tanaka

NO. 10998

IN THE SUPREME COURT OF THE STATE OF HAWAII

PATSY MINK and MARILYN BORNHORST, in their official capacity as councilmembers of the City and County of Honolulu, State of Hawaii, on behalf of themselves and all other voters of the City and County of Honolulu, Petitioners, vs. RAYMOND K. PUA, City Clerk, City and County of Honolulu, TORAKI MATSUMOTO, and RUDY PACARRO, Respondents. and REPUBLICAN PARTY OF HAWAII, Intervenor.	ORIGINAL PROCEEDING Filed in the Supreme Court of the State of Hawaii on November 27, 1985 at 4:21 p.m.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

CERTIFICATE OF SERVICE

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Attorney for Republican
Party of Hawaii

NO. 10998

IN THE SUPREME COURT
OF THE STATE OF HAWAII

PATSY MINK and MARILYN)
BORNHORST, in their)
official capacity as)
councilmembers of the)
City and County of)
Honolulu, State of)
Hawaii, on behalf of)
themselves and all)
other voters of the)
City and County of)
Honolulu,)
)
Petitioners,)
)
vs.)
)
RAYMOND K. PUA, City)
Clerk, City and County)
of Honolulu, TORAKI)
MATSUMOTO, and RUDY)
PACARRO,)
)
Respondents.)
)
and)
)
REPUBLICAN PARTY OF)
HAWAII,)
)
Intervenor.)
)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rudy Pacarro, Toraki Matsumoto and the

Republican Party of Hawaii appeal to the Supreme Court of the United States from the Order Granting Writ of Mandamus entered by this Court on November 26, 1985 at 4:30 p.m. interpreting the Charter of the City and County of Honolulu as precluding Toraki Matsumoto and Rudy Pacarro from running for the Honolulu City Council in the special election called to fill the vacancies created by their recall. That Order constitutes a final judgment or decree within the meaning of 28 U.S.C. Sec. 1257.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2). This appeal is from an Original Proceeding for a Writ of Mandamus commenced in the Supreme Court of the State of Hawaii. The clerk of the Supreme Court will be served with a copy of this notice both as the clerk of the Court from whose order or decree the appeal is taken and as clerk of the court possessed

of the record.

DATED: Honolulu, Hawaii, November 27, 1985

/s/ BOYCE R. BROWN, JR.
Attorney for Matsumoto
and Pacarro

/s/ GEORGE DYER, JR.
Attorney for Republican
Party of Hawaii

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TORAKI MATSUMOTO, et al.,	)	CIVIL NO. 85-0950
Plaintiffs,	)	Filed December 4, 1985
vs.	)	
RAYMOND PUA, et al.,	)	
Defendents.	)	

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs' motion for partial summary judgment came on for hearing before this court on December 4, 1985. An expedited hearing was held in order to determine the status of Toraki Matsumoto and Rudy Pacarro and its effect upon the need of the Republican Party to substitute candidates in the special election within the deadline of December 4, 1985 as ordered by the Hawaii Supreme Court. This court, having reviewed the motion and the memoranda in

support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises therein, finds as follows:

On November 26, 1985, the Hawaii Supreme Court granted a writ of mandamus, ruling that Toraki Matsumoto and Rudy Pacarro could not run in the special election, pursuant to sec. 3-105 of the Revised Charter of the City and County of Honolulu. Mink v. Pua, No. 10998 (Hawaii 1985). The plaintiffs argue that this interpretation renders that section of the City Charter unconstitutional as a violation of the plaintiffs' rights under the first and fourteenth amendments.

The plaintiffs further argue that collateral estoppel is inapplicable because the constitutional issues were not ruled upon by the Hawaii Supreme Court. More specifically, the plaintiffs argue that the Hawaii Supreme Court's order does not

address the constitutional issue, and Justice Nakamura's statement during oral argument on November 29, 1985 indicates that the state court would not reach the issue.

This court finds the plaintiffs are in error, and that the constitutional issues were decided by the state supreme court. The plaintiffs briefed and argued the constitutional issues on the Motion for Writ of Mandamus. Accordingly, the Hawaii Supreme Court by its decision must have considered the constitutional issues, either expressly or sub silentio. (No written decision of the Hawaii Supreme Court has been filed as of this date.) Furthermore, Justice Nakamura's alleged statement on November 29, 1985 probably referred to the fact that the relief sought by the plaintiffs was a delay of the election, and that the supreme court need

not review its decision as to the City Charter's constitutionality.

Therefore, the Hawaii Supreme Court has ruled that a municipality may constitutionally bar an elected official who has been ousted from office by recall, impeachment or resignation from succeeding himself in a special election. Whether that decision was correct or erroneous is not for this court to decide. The plaintiffs are barred by res judicata and collateral estoppel from relitigating in this court the same issues which have already been argued. The plaintiffs' proper remedy is by way of appeal to the U.S. Supreme Court.

Accordingly, IT IS HEREBY ORDERED that the plaintiffs' motion for partial summary be and the same is, DENIED.

DATED: Honolulu, Hawaii, December 4, 1985

/s/ Harold M. Fong

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TORAKI MATSUMOTO, et al.,	)	No. 85-7683
Petitioners,	)	DC# CV 85-0950-HMF District of Hawaii
vs.	)	
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII,	)	Filed Dec. 12, 1985
Real Parties in Interest,	)	
and	)	
RAYMOND K. PUA, City Clerk, City and County of Honolulu,	)	ORDER
Real Parties in Interest.	)	

Before: KENNEDY, HUG and SKOPIL, Circuit Judges

Plaintiffs' emergency petition for a writ of mandamus is denied. Mandamus review is inappropriate because the district court order denying partial summary judgment is appealable as a denial of injunctive relief under U.S.C. Sec.

1292(a)(1). Moreover, the district court did not err by holding that the Hawaii Supreme Court decision collaterally estopped plaintiffs from relitigating the constitutionality of a limited prohibition against city councilmen running to fill the vacancies created by their own recall from office. Plaintiffs briefed this issue in the state court without reserving their right to return to federal court, and the Hawaii Supreme Court expressly held that the limited prohibition did not violate the federal constitution. See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421-22 (1964).

CONSTITUTION, STATUTES, ORDINANCES

U.S. CONST. AMEND. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercies thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. XIV, ART. I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws.

28 U.S.C. Sec. 1257:

Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

42 U.S.C. Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REVISED CHARTER OF THE CITY AND COUNTY OF HONOLULU 1973 (1983 EDITION):

Section 3-102. Number, Election and Terms of Office of Councilmen - The council shall consist of nine members. One member shall be elected from each of the nine districts hereinafter provided. The terms of office of councilmen shall be four years beginning at twelve o'clock meridian on the second day of January following their election.

. . .

Section 3-105. Vacancy in Office - A vacancy in the office of any councilman shall be filled in the following manner:

(a) If the unexpired term is less than one year, the remaining members of the council shall elect a successor with requisite qualifications to fill the vacancy for the unexpired term. Vacancies shall be filled only at a regular meeting of the council after reasonable notice of

intent to fill the vacancy has been given to all remaining members of the council by the presiding officer. Should the council fail to fill any vacancy within thirty days after its occurrence, the mayor shall appoint a successor to fill the vacancy for the unexpired term.

(b) If the unexpired term is for one year or more, the vacancy shall be filled by special election to be called by the council within ten days and to be held within sixty days after the occurrence of the vacancy. At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. If any special or general election is to be held in the city after thirty days and within one hundred eighty days after the occurrrence of the vacancy, then the election shall be held in conjunction with such other election.

. . .

Section 12-102. Recall of a District Councilman - A district councilman may be removed by recall which shall be initiated upon petition signed by registered voters equal in number to at least ten percent of the votes cast in his district at the last preceding city general election.

Section 12-103. Recall Petition; Recall Election - Each elector signing a recall petition shall add to his signature his address, his council district and the date of signing. Signatures on a recall petition may be on separate sheets but each sheet shall have appended to it the affidavit of some person, not necessarily a signer of the peittion, that to the best of affiant's knowledge and belief the persons whose signatures appear on the sheet are registered electors of the city, that they signed with full knowledge of the contents

of the petition, and that their residences are correctly given.

A recall petition shall be tendered for filing with the city clerk. The clerk shall examine it to see whether it contains a sufficient number of apparently genuine signatures of registered voters. The clerk may question the genuiness of any signature or signatures appearing on the recall petition and if he finds that any such signature or signatures are not genuine, he shall disregard them in determining whether the petition contains a sufficient number of signatures. He shall also disregard any signature dated more than sixty days before the petition was tendered for filing. The clerk shall eliminate any sheet of the petition which is not accompanied by the required affidavit. The invalidity of any sheet of the petition shall not affect the validity

of the petition if a sufficient number of signatures remains after eliminating such an invalid sheet. The clerk shall complete his examination of the petition within fifteen days after the submission of the petition to him and shall thereupon file the petition if valid or reject it if invalid.

As soon as the clerk has accepted a recall petition for filing, he shall notify the elected officer that the petition has been filed. Upon receipt of such notice, the elected officer may resign from his office and thereupon the recall proceedings shall terminate.

If the elected officer does not resign from his office within ten days after notice of the filing of such petition shall have been given to him, the clerk shall arrange a recall election. If a general or special city or State election is to be held not less than thirty days nor more

than ninety days after the ten days have expired, the recall question shall be placed before the electors at such an election. Otherwise a special recall election shall be fixed for a date not earlier than thirty days nor later than ninety days after the ten days have expired± The elected officer may resign at any time prior to the recall election and thereupon the election shall not be held.

The following question shall be presented to each elector in a recall election: "Shall (name of elected officer) be recalled and removed from the office of (title of office)?"

If a majority of the registered electors who vote on the question at a recall election shall vote "Yes", the elected officer shall be deemed recalled and removed from office, otherwise he shall remain in office.

No person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment of any office of the city within two years after his removal or resignation.

No recall petition shall be filed against an elected officer within the first or the last year of the term of his office or within six months after an unsuccessful recall election against him.

Section 12-201. Impeachment of the Mayor - The mayor may be impeached for malfeasance, misfeasance or non-feasance in office. The supreme court of the State shall constitute a board of impeachment in any proceeding for the removal of the mayor who may be charged on any of the foregoing grounds. The charges shall be set forth in writing in a petition for impeachment

signed by not less than five hundred qualified electors of the city, and said signatures shall be necessary only for the purpose of filing the petition. The petition having once been filed, hearings shall be held on all such charges. The board of impeachment may appoint a master and invest him with power to investigate the charge and report thereon to the board. If the board sustains the charge, the mayor shall be deemed removed from office.

Section 12-202. Impeachment of a Councilman - Any councilman may be removed for malfeasance, misfeasance or non-feasance in office or for interference with the performance of the duties of any officer or employee in any executive agency of the city government. The supreme court of the State shall constitute a board of impeachment in any proceeding for the removal of a councilman who may be charged

on any of the foregoing grounds. The charges shall be set forth in writing in a petition for impeachment signed by not less than five hundred qualified electors of a district for the removal of a councilman, and said signatures shall be necessary only for the purpose of filing the petition. The petition having once been filed, hearings shall be held on all such charges. The board of impeachment may appoint a master and invest him with the power to investigate the charge and report thereon to the board. If the board sustains the charge, the councilman shall be deemed removed from office.

Supreme Court, U.S.
FILED
MAR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1425

IN THE

Supreme Court of the United States

October Term, 1985

REPUBLICAN PARTY OF HAWAII, TORAKI MATSUMOTO AND RUDY PACARRO,

Appellants,

vs.

PATSY MINK, MARILYN BORNHORST and RAYMOND K. PUA, CITY CLERK, CITY AND COUNTY OF HONOLULU,

Appellees.

Appeal From The Supreme Court Of The State Of Hawaii

MOTION OF APPELLEES PATSY MINK AND MARILYN BORNHORST TO DISMISS OR AFFIRM

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Appellees Patsy Mink and Marilyn Bornhorst move this Court to dismiss the Appeal herein as moot, or in the alternative, to affirm the judgment of the Supreme Court of Hawaii on the ground that it is manifest that the Federal questions on which the decision of the cause depends are so unsubstantial as to not require further argument.

I. INTRODUCTION

Appellants Matsumoto and Pacarro are former City Councilmen from the City and County of Honolulu. They were recalled by the voters in a Special Recall Election. They attempted to run in the Special Election to fill the vacancy created by their recall. The Hawaii Supreme Court decided they could not, based upon its construction of the applicable Ordinance.

The Supreme Court of Hawaii's decision rested entirely upon its construction of the word "successor" as used in the Revised Charter of the City and County of Honolulu (hereinafter R.C.H.). The Court interpreted the term "successor" to mean that one could not succeed himself. Thus, this case turns on the Hawaii Supreme Court's construction of a single term used in the R.C.H., purely a matter of State law, and does not present issues which are substantial enough to require review by this Court.

A. Decision Below

In the decision below, the Hawaii Supreme Court construed Section 3-105(b) of the R.C.H. as prohibiting Appellants Matsumoto and Pacarro from running in the election to fill the vacancy created by their recall. Appellants' Jurisdictional Statement Appendix A-1 - A-15. (Hereinafter "J.S. App."). Section 3-105(b) reads:

> *Vacancy in Office* — a vacancy in the office of any councilman shall be filled in the following manner:
>
> * * *
>
> (b) If the unexpired term is for one year or more, the vacancy shall be filled by special election to be called by the council within ten days and to be held within sixty days after the occurrence of the vacancy. At such time, the electors of the district shall elect a successor to fill the vacancy for the remainder of the term. If any special or general election is to be held in the city after thirty days and within one hundred eighty days after the occurrence of the vacancy, then the election shall be held in conjunction with such other election.

J.S. App. A-34.[1] This Ordinance applies to all vacancies, whether created by recall, death, disability or other reason.[2]

The Court's decision that Section 3-105(b) of the Charter prevents Appellants from running in the Special Election is purely a matter of defining state law. The Court ruled that the word "successor", as used § 3-105(b), is "one who takes the place of another." J.S. App. A-6.

---

[1] The full text of Section 3-105(b), as well as other constitutional provisions, statutes and charter provisions are contained in the Appendix to the Appellants' Jurisdictional Statement which is incorporated herein by reference.

[2] The recall procedures of the City and County of Honolulu provide for a three step procedure: 1) verified petitions asking for recall of the councilmen, signed by ten percent (10%) of the registered voters must be submitted to the City Clerk's Office. (R.C.H. Section 12-103, J.S. App. A-35 - A-39); 2) a recall election is held whereby the councilman runs unopposed, with his constituents voting for or against recall — only if a majority votes to recall the councilman is he recalled. (R.C.H. Section 12-103, J.S. App. A-35 - A-39); and 3) if the voters recall the councilman, a Special Election is held to elect his "successor". (R.C.H. 3-105(b)).

In other words, a person cannot succeed himself. A recalled councilman cannot run for the same office again in the *Special* Election called to fill his own vacancy. Appellants are free to run for any other office, and they can run for the same office again in the *regular* election. But the Supreme Court of Hawaii ruled that they cannot be their own "successors" under the provisions of this Ordinance. J.S. App. A-6-A-8.

The Court then held that this construction of Section 3-105(b) of the Charter does not violate the First and Fourteenth Amendments of the United States Constitution. Employing the test established by this Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), the Court held that there was no character or magnitude to the Appellants' asserted injury because the Appellants ran for office, knowing that they could be recalled. J.S. App. A-11. Secondly, securing the electorate's right to recall councilmen by majority vote for whatever reason deemed appropriate is paramount to the burden placed upon the Appellants. J.S. App. A-12. And, lastly, the Court held that disqualifying a recalled public official from running in the election to fill the seat vacated by his recall is a necessary step to accomplish the Charter's goal of allowing the citizens to decide whether to recall a councilman. J.S. App. A-13 - A-14.

B. Relief Appellees Request

Appellees request that this Court dismiss the Appeal as moot because the Special Election in which Appellants Pacarro and Matsumoto sought to run was held on December 28, 1985. Two new councilmen have assumed Mr. Pacarro's and Mr. Matsumoto's former offices. The *reg-*

ular election for a new term to these same offices is scheduled for September, 1986. At that time, both Mr. Matsumoto and Mr. Pacarro can run for their former offices.[3] Therefore, by the time this Court decides whether it has jurisdiction and the case is fully briefed and argued, the Court's ruling will have no effect whatsoever — even if Appellants are successful. The most this Court could do is order that another election be held to allow Appellants to run for their former offices. There is already such an election scheduled for September 1986, so this Appeal is unnecessary and should be dismissed as moot.

Alternatively, Appellees request that the decision of the Hawaii Supreme Court be affirmed because there is no substance to the Federal claims presented by the Appellants. The decision of the Hawaii Supreme Court was based upon its construction of Section 3-105(b) of the Charter, purely a matter of state law which this Court is powerless to review. Appellants' attempt to turn the decision into a constitutional case is clearly misplaced. The restriction upon access to the ballot created by the Hawaii Supreme Court's decision is miniscule. It prohibits only one person — the former office holder — from running for one office — his former office from which he was recalled, in one election — the Special Election to fill the vacancy created by his recall. This minimal limitation of access to the ballot is required to give substance to the electorate's right to recall an elected official by majority vote. Thus, under this Court's balancing test developed in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), prohibiting Appellants from running in the Special Election is not an unconstitutional infringement of their First and Fourteenth Amendment rights.

---

[3] In a related issue, but in a different lawsuit, Appellants Matsumoto and Pacarro successfully challenged restrictions in the Honolulu City Council which would have prevented them from holding *any* City or County office for two years following their recall. *Matsumoto, et al. v. Pua,* No. 85-0950 (D.Haw. filed Mar. 3, 1986). Appendix, *infra,* pp. A-1-A-9. (Hereinafter "App. A"). The Ninth Circuit found this restriction was unconstitutional. That question is not before this Court. This lawsuit concerns only the validity of the Hawaii Supreme Court's opinion on the meaning of the word "successor".

II. MOTION TO DISMISS

A. This Court Will Not Decide A Claim That Is Moot

It is well settled that this Court will not decide questions when a decision cannot affect the rights of the particular litigants before the Court. *De Funis v. Odegaard,* 416 U.S. 312 (1974); *North Carolina v. Rice,* 404 U.S. 244 (1971). Where, as here, the question has become moot due to subsequent developments which are no fault of the parties, the appeal will be dismissed as moot. *Flast v. Cohen,* 392 U.S. 83 (1968). The prohibition against this Court entertaining jurisdiction over appeals which are moot is based on Article III of the Constitution which limits the exercise of Federal judicial power to actual cases or controversies. *Powell v. McCormack,* 395 U.S. 486 (1969); *Liner v. Jafco, Inc.,* 375 U.S. 301 (1964). This Court must make its own determination of whether the case is moot at the time it considers the case, not at the time the action is filed. *De Funis,* 416 U.S. at 316; *Roe v. Wade,* 410 U.S. 113, 125 (1973).

B. The Case Is Moot Because Appellants Can Run For The Offices They Seek In September Of 1986

Although the relief Appellants request is unclear, it appears that they seek to run in a new election for their old council seats. They already have that right. The Appellants can run in the General Election to be held in September of 1986, five months from now. There is absolutely nothing this Court can do to grant Appellants any speedier relief than they already have. Thus, there is no reason for the United States Supreme Court to disrupt the electorial process of the City and County of Honolulu.

C. The Occurrence Of The Special Election In Which Appellants Sought To Run Makes This Case Moot

The occurrence of the Special Election in which Appellants sought to run is an intervening event making this case moot.

Brockington v. Rhodes, 396 U.S. 41 (1969), is controlling in this case. In *Brockington,* this Court held that a suit challenging the validity of Ohio's seven percent (7%) signature requirement for independent candidates to appear on the ballot for the House of Representatives was moot because of the intervening occurrence of the 1968 election in which Brockington sought to run. Brockington had filed a mandamus petition in state court challenging the validity of the signature requirement as it applied to him in this one election. The writ was aimed *solely* at placing his name on the ballot in the 1968 election. Because Brockington requested very limited relief, did not represent a class and did not request a declaratory judgment, the Court found it impossible to grant him the limited, extraordinary relief requested and dismissed the claim as moot.[4]

The facts of this case are almost identical to those in *Brockington.* Appellants sought only a very limited form of relief — that the writ of mandamus be denied so that they could run in one specific election. As in *Brockington,* due to the occurrence of the election, there is nothing that this Court can do to offer the Appellants any effective relief, even if Appellants were to prevail.

D. This Case Is Not "Recurring, Yet Evading Review"

The ''recurring, yet evading review'' exception to the mootness doctrine is applicable only where there is a ''reasonable expectation that the complaining party will be subjected to the same injury.'' *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975). Appellants' suggestion that: ''This Candidacy case is truly 'capable of repetition, yet evading review' '' (Appellants' Jurisdictional Statement, at 22), does not meet this standard. To be subjected to the same injury, Appellants must show that they intend to run again, will be elected, will be recalled, and will be barred from running to fill the vacancy created by their recall.

And if the events in this case were to recur, there would be a much greater likelihood of the case being reviewed. First, the Supreme Court of Hawaii has already expressed its opinion on the matter and, consequently, there would be only a slight delay before the matter came up for review by this Court. Secondly, much of the problem in this case is that Mr. Pacarro and Mr. Matsumoto were recalled only 15 months before the expiration of their term. Had they been recalled earlier, this case could have been fully litigated in time to offer Appellants effective relief. And, lastly, future office holders subject to the ban on running could bring a claim for declaratory relief or a class action. Both would keep the claim alive.

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[4] This Court has reached similar holdings in other election cases. *Cousins v. Wigoda,* 409 U.S. 1201 (1972); *Mills v. Green,* 159 U.S. 651 (1895).

The election cases in which this Court has applied the "capable of repetition, yet evading review" doctrine to hold that the case is not moot after an election has occurred are distinguishable on the four grounds found controlling in ***Brockington***: (1) Appellants do not allege they will be subjected to the same injury; (2) Appellants are not maintaining a class action on behalf of themselves and other elected officials, present and future;[5] (3) Appellants are not suing for themselves and their supporters;[6] and (4) Appellants did not seek a declaratory judgment from the Hawaii Supreme Court.[7] *See Brockington v. Rhodes,* 396 U.S. at 43.

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[5] The case of *Brown v. Chote,* 411 U.S. 452 (1973), can be distinguished because it involved a class action brought by the candidate and the other candidates, present and future. This created a much greater likelihood that one of the plaintiffs would be subjected to the same harm in the future. *Dunn v. Blumstein,* 405 U.S. 330 (1972), can be distinguished because it involved a class action brought by a voter on behalf of himself and other voters similarly situated. Although in *Moore v. Ogilvie,* 394 U.S. 814 (1969), the complaint was not filed as a class action suit, there were 25 named plaintiffs. This created a great likelihood that one of them would be subjected to the same harm in the future if he decided to run again.

Based on the arguments and authorities above, this case is now moot and should be dismissed as not presenting a case or controversy.

III. MOTION TO AFFIRM

In the alternative, Appellees Mink and Bornhorst submit that the issues raised by Appellants in their Jurisdictional Statement are so unsubstantial as to not require full review by this Court.

A. The Decision Of The Hawaii Supreme Court Rests Entirely Upon State Grounds

The decision of the Hawaii Supreme Court rests entirely upon its construction of Section 3-105(b) of the

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[6] The following cases can be distinguished from the case at bar because the candidate brought an action on behalf of himself and others situated like him as voters. *Anderson v. Celebrezze,* 460 U.S. 780 (1983); *American Party of Texas v. White,* 415 U.S. 767 (1973); *Storer v. Brown,* 415 U.S. 724 (1974); *Brown v. Chote,* 411 U.S. 452 (1973).

[7] A declaratory judgment extends its benefits to those situated similarly to the plaintiff even if not formally in a certified class with him. The following cases can be distinguished from the present one because the complaint requested a declaratory judgment as well as injunctive relief. *Anderson v. Celebrezze,* 460 U.S. 780 (1983); *Democratic Party of the United States v. Wisconsin,* 450 U.S. 107 (1981); *Fishman v. Schaffer,* 429 U.S. 1325 (1976); *American Party of Texas v. White,* 415 U.S. 767 (1973); *Storer v. Brown,* 415 U.S. 724 (1974); *Brown v. Chote,* 411 U.S. 452 (1973); *Dunn v. Bloomstein,* 405 U.S. 330 (1972); *Moore v. Ogilvie,* 394 U.S. 814 (1969).

Charter. This is a local Charter enacted by the people of the City and County of Honolulu. The Supreme Court of Hawaii has construed this provision of the Charter as banning a recalled councilman from running in the Special Election to fill the vacancy created by his own recall. Because the decision rests upon state grounds, this Court is powerless to review the decision, except insofar as it deals with Federal constitutional rights. *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86 (1909).

B. The Ban On Allowing Appellants To Run In The Election To Fill Their Vacant Seats Does Not Violate The First And Fourteenth Amendments Of The United States Constitution

As Justice Rehnquist noted in denying the Stay in this very case, there is a "presumption of constitutionality accorded to state and local laws . . ." App. A-11.

Pursuant to the holding of this Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), the Hawaii Supreme Court examined the character or magnitude of the asserted injury, the interest of the City and County in justifying the burden placed upon the Appellants by being banned from running in the Special Election and the necessity of the ban to accomplish the alleged public interest.

Significantly, the majority of this Court in *Anderson* found that the state's interest in political stability is sufficient to vindicate a statute prohibiting a defeated candidate in a party primary from running as an independent. 460 U.S. at 783. The Charter provision now challenged is much closer to the statute upheld in *Anderson* than the one struck down.

There is little, if any, character or magnitude to the injury which Appellants assert. The Appellants *did* have a chance to run for the remainder of their term—they ran unopposed in the Recall election and lost.[8] Thus, Appellants Pacarro and Matsumoto were indeed able to run for the unexpired portion of their term. More importantly, without the two year ban on running for city offices, Appellant may now seek any office they wish — including their old council seats which are up for election in September of 1986. To suggest that Section 3-105(b) presents a significant abridgment of Appellants' constitutional rights is illegitimate.

Secondly, the interest indicated by the Hawaii Supreme Court of assuring the citizens' right to recall a city councilman by majority vote in a recall election, is of paramount interest to the Appellants' interest. The Court did not come up with this government interest *sua sponte;* rather, this interest was argued considerably in the Emergency Petition for Writ of Mandamus. (*See* Emergency Petition For Writ Of Mandamus, at 5 and 17).

As the Hawaii Supreme Court noted, it would clearly frustrate the will of the majority that recalled the councilman if a plurality could then put him back in office for the remainder of his term.

Lastly, disqualification is necessary to assure that the electorate has an effective voice in deciding whether to recall the councilman. Obviously, precluding the councilman from running to succeed himself is necessary to achieve this end. Because lack of primary and special elections often results in a winner being chosen by plurality, a ban on running is necessary to assure that the recall is effective. As the Supreme Court of Hawaii noted, the process of recall by a majority and election by plurality could take place several times during a councilman's term if Appellants' view is accepted. J.S. App. A-13 - A-14.

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[8] Appellants' knowledge that they could be recalled, while not waving their right to contest the constitutionality of Section 3-105(b), certainly diminishes the weight of their claim.

C. The Hawaii Supreme Court's Construction Of Section 3-105(b) Of The Charter Does Not Contravene The Injunction Of The U.S. District Court

Appellants mistakenly read the prohibition against running in an election to fill the vacancy created by one's own recall (in Section 3-105(b) of the R.C.H.) as being dependent upon the two year ban on running which was recently found unconstitutional. Nothing could be further from the truth. A ban on running to fill the vacancy created by one's own recall does not depend on the two year ban for seeking any city office for two years after being recalled.

The two provisions are separate and independent parts of the Charter. Whether the two year ban on running for any office after recall is unconstitutional has no effect on whether the Hawaii Supreme Court's construction of the word "successor" as used in § 3-105(b) is unconstitutional. The Hawaii Supreme Court's interpretation of the Charter, therefore, does not contravene the injunction which the United States District Court for the District of Hawaii which was directed at the two year ban on running of Section 12-103 of the R.C.H.

D. The District Court Properly Refused To Exercise Jurisdiction

Contrary to Appellants' claim, the issue of the constitutionality of the ban on Appellants running to fill the vacancy created by them was fully litigated before, and decided by the Supreme Court of Hawaii. If it were not, Appellants would have no basis for a direct appeal to this Court.

1. The Decision Of The Hawaii Supreme Court Has Res Judicata And Collateral Estoppel Effect

In *England v. Lousiana Medical Examiners,* 375 U.S. 411 (1964), this Court developed the following abstention doctrine rule applicable to this case:

> . . . [I]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then — whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court.

Id. at 419.

In this case, Appellants lost their right to return to the District Court by litigating their constitutional claims in state court. The possible infringement upon access to the ballot and the *Anderson v. Celebrezze,* 460 U.S. 780, standards were addressed by Appellants in their Memorandum in Support of the Motion to Dismiss the Emergency Petition for Writ of Mandamus and at oral argument.

On these facts, the District Court and Court of Appeals correctly held that Appellants' only avenue of appeal is to this Court.

2. Even If The Appellants Did Not Have A Fair Opportunity To Litigate Their Constitutional Claims, Their Only Remedy Is By Writ of Certiorari

The District Court for the District of Hawaii, as well as the Ninth Circuit Court of Appeals, have held that the constitutional issue was properly addressed by the Hawaii Supreme Court and that the decision, therefore, has collateral estoppel effect. J.S. App. A-26 - A-29. If Appellants wish this Court to review these decisions, they must file a Petition for Writ of Certiorari of the Ninth Circuit decision. They have not done so. Appellants' request that this Court hold that the District Court has jurisdiction over the matter should therefore, be dismissed without argument.

VI. CONCLUSION

Appellants are attempting to use this Court as an appellate court with general powers to review all decisions of a state's highest court. It is not. This Court should decline to accept jurisdiction over the present Appeal not only because this action is now moot, but also because the Federal issues presented by the Appeal are so lacking in substance that the decision of the Hawaii Supreme Court should be summarily affirmed.

The occurrence of the Special Election in which Appellants sought to run makes this case moot. The Appellants requested only that they be allowed to run in the Special Recall Election to fill the vacancy created by their own recall. They did not represent a class and did not request a declaratory judgment. Because Appellants can run for their former seats in the September of 1986 General Election, there is no remedy this Court can fashion which Appellants do not already have.

In the alternative, the decision of the Hawaii Supreme Court should be affirmed. The Hawaii Supreme Court's construction of Section 3-105(b) of the Charter presents only a slight infringement upon the Appellants' access to the ballot — they cannot run to fill the vacancy created by their own recall. The Supreme Court of Hawaii properly found that such a construction of the Charter was necessary to assure that the citizens' right to recall an elected official is properly honored. Under this Court's balancing test in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), prohibiting a recalled councilman from running for the unexpired portion of his term is constitutional.

Wherefore Appellees Mink and Bornhorst respectfully submit that the question upon which this cause depends is not only moot, but also so unsubstantial as not to need further argument. Appellees therefore respectfully move this Court to dismiss this Appeal or, in the alternative, to affirm the judgment entered by the Supreme Court of Hawaii.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 85-0950

TORAKI MATSUMOTO, et al.,

Plaintiffs,

vs.

RAYMOND K. PUA, City Clerk,
City and County of Honolulu,

Defendant,

and

DEMOCRATIC PARTY OF THE
STATE OF HAWAII, JAMES KUMAGAI,

Intervenors-Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR DECLARATORY AND PERMANENT INJUNCTIVE RELIEF

(Filed March 3, 1986)

With this order, a lengthy and complex legal battle finally comes to an end. The process began in the political arena plaintiffs Toraki Matsumoto, George Akahane and Rudy Pacarro switched from the Democratic to the Republican Party. A campaign was quickly initiated by various members of the Democratic Party to recall the councilmen.

Under Article XII, Section 12-103 of the Revised Charter of the City and County of Honolulu (hereinafter referred to as the "RCH"), if ten percent of the voters who participated in the last election sign a recall petition, the council member must either submit to a recall election or resign. If the council member resigns or is defeated, he or she is thereafter prohibited from running for or being appointed to a city post for two years. An official may be recalled for any or no reason.

On October 5, 1985, Councilmen Toraki Matsumoto, Rudy Pacarro and George Akahane were recalled. A special election was scheduled, and the recalled councilmen attempted to place their names upon the ballot. City Clerk Raymond Pua refused, citing RCH 12-103. These councilmen and eight other voters in their districts moved for a temporary restraining order to require Pua to place the names of Matsumoto, Akahane and Pacarro on the ballot for the special election. The plaintiffs argued that the two year penalty was unconstitutional.

On October 15, 1985, Senior Judge Samuel P. King and Senior Judge Martin Pence denied the motion for injunctive relief. On October 18, 1985, Chief Judge Harold Fong filed his dissent. On October 28, 1985, the Ninth Circuit reversed the majority decision with regard to the two year penalty provision, and remanded the case to district court. On the same day, pursuant to the Ninth Circuit's decision, Judges Fong and Pence filed an order granting the preliminary injunction. Judge King recused himself from further consideration in the case.

On November 26, 1985, without addressing the two year penalty provision, the Hawaii Supreme Court held that pursuant to RCH § 3-105, the plaintiffs were barred from running in the special election. *Mink v. Pua,* No. 10998 (Hawaii 1985). On December 4, 1985, this court denied the plaintifffs' motion for summary judgment which would have effectively overruled the Hawaii Supreme Court's opinion. The state order is currently on appeal to the United States Supreme Court.

On January 10, 1986, the plaintiffs filed the present motion for declaratory and permanent injunctive relief. On February 14, 1986, the defendants filed statements of no opposition to the motion.

I. APPOINTIVE POSITIONS

The plaintiffs seek declaratory judgment as to the two year ban on both elective as well as appointive positions. The court finds that the issue of appointive positions is not a proper issue of adjudication. First, the issue is not yet ripe. The plaintiffs have presented no evidence that appointive positions are being denied because of the two year ban. Although Mayor Frank Fasi has apparently offerred a position to Akahane, there is no evidence of any action by third parties preventing Akahane from accepting. The court will refrain from deciding abstract issues or giving advisory opinion. Therefore, without a showing that the plaintiffs are being denied appointive positions, the issue is not yet ripe for adjudication.

Second, the present defendants have no authority to deny appointive positions. Therefore, they have little motive to litigate the issue of appointive positions. Furthermore, an injunction against the present defendants provides no effective relief. Because of the lack of an adversarial setting and because an injunction will not provide any effective relief, that issue is not proper for adjudication with these parties.

II. ELECTIVE POSITIONS

Under RCH 12-103, Pua may not place the plaintiffs' names on the ballot for the general election, absent a court order. Therefore, the two year penalty provision is preventing the plaintiffs from running in the 1986 general election. In determining whether the penalty provision is unconstitutional, the court must consider both the First Amendment as well as the Equal Protection Clause.

Candidacy restrictions implicate First Amendment rights of voters as well as candidates. Many voters can only assert their political preferences by voting for candidates, joining political parties, or both. *Lubin v. Panish*, 415 U.S. 709, 716 (1974). "The exclusion of candidates from the ballot infringes on the voters' freedom of association because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).

Furthermore, the right to equal access in voting is a fundamental one. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). A restriction on candidacy may heavily burden the fundamental right to vote. *Lubin v. Panish*, 415 U.S. at 716. However, "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock v. Carter*, 405 U.S. at 143. Each case must be viewed under its peculiar facts and circumstances. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

A. *The Appropriate Standard*

In two recent decisions, the Supreme Court has set forth the appropriate standard of review in candidate access cases: *Clements v. Fashing*, 457 U.S. 957 (1982) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Both cases dealt with the issue of candidacy restrictions and voter rights, and both cases applied some type of balancing test. *Anderson* is the most recent Supreme Court pronouncement on the issue and commands a majority of the court, whereas *Clements* garnered only a plurality. Therefore, the court will apply the *Anderson* test.

In *Anderson,* an Ohio statute required an early filing deadline for independent candidates in the presidential general election. John Anderson ran for president on an independent ticket, and was unable to garner sufficient signatures within the short amount of time provided for in the Ohio statute. The law was challenged as an unconstitutional deprivation of Anderson supporters' First Amendment rights.

In passing upon the constitutionality of the Ohio statute, the Supreme Court set forth the following balancing test:

> [The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. at 789.

In applying the *Anderson* balancing test, the court must consider the character and magnitude of the injury asserted by the plaintiffs, the nature of the city's interests, and the necessity of the restrictions to achieving the city's goals.

B. *The Character and Magnitude of the Asserted Injury*

The city council members were recalled without any showing of malfeasance, misfeasance, or nonfeasance. As an expression of their freedom of speech, the voters have this right to decide arbitrarily who will represent them. *See, e.g., Gordon v. Leatherman,* 450 F.2d 562, 567 (5th Cir. 1971).

The candidates, however, have not been merely recalled, but have also been prohibited from holding elective city office for two years. Thus, a majority of the voters is allowed to exclude candidates based upon political preferences. The infringement upon the First Amendment is exacerbated by the fact that the exclusion of the plaintiffs was apparently based upon the councilmen's decision to change political parties. The penalty provision, therefore, substantially burdens the councilmen's First Amendment rights.

The penalty provision likewise burdens the constituents' right to vote for the candidate of their choice. The right of a voter to support a candidate of his or her choice is an important interest to be protected. *Anderson,* 460 U.S. at 787. Furthermore, the recall of a councilman does not necessarily imply that a majority of the voters will not consider the official to be the most suitable of the candidates in the next election. The right of the people to maintain a flexible and evolving decision-making process is another significant interest which is burdened by the penalty provision. *See, e.g., De Bottari v. Melendez,* 44 Cal. App. 3d at 921.

C. *The Asserted Interests of the City*

The intervenors have previously suggested that the city has the right to insure that its officials are open, honest, and responsive to their constituents. They argued that the present plaintiffs have broken a covenant to the voters, and that such a breach requires retribution. Although the defendants no longer oppose the motion for declaratory relief, the arguments should be addressed.

The court finds that the record is devoid of any evidence that the voters recalled their respective councilman for a breach of covenant. Any breach of covenant was not to the voters, but more likely to the political party of the councilmen's former affiliation. Under the present circumstances, the city has no particular interest in enforcing party discipline.

The city clearly has a legitimate interest in insuring that its officials are responsive to their constituents. The issues remaining, however, are whether the interest is achieved through the penalty provision, and whether the city's interest outweighs the interests of the candidates and voters.

D. *The Necessity of the Restriction to the City's Goals*

The penalty provision is unnecessary to achieve the city's asserted goals.

A recall election, and even the threat of such an election, is sufficient to achieve the necessary accountability. Undergoing a recall election can have drastic professional and financial consequences for a public official. Forcing an elected official to undergo such an ordeal solely to retain his or her position, a position which was earned only after battling through a general election, is sufficient to ensure that a public official is responsive to his or her constituents once elected.

The penalty provision does not significantly add to this substantial deterrent effect. The only significant effect of the penalty provision is to restrict the field of candidates from which the voters can select the representative of their choice. If the recalled official is believed to be irreparably unresponsive to his constituents, then he or she will not succeed in the general election and the penalty provision would therefore be unnecessary. If the recalled official were to succeed in the general election, that would be absolute proof that the voters consider the candidate to be a responsive official, and the penalty provision would unnecessarily burden the constituents' First Amendment rights. The voters are the best judges of the accountability of the recalled official.

The court further notes that few other states or counties have similar penalty provisions in their recall statutes. *See* First Supplemental Memorandum of Defendant Raymond K. Pua (filed October 10, 1985). One could infer that few other legislatures have found a need to impose a similar penalty to achieve the same goals.

Finally, the court finds it unusual that a recalled official is subject to a two year penalty provision, whereas an impeached official is not. If it is unnecessary to bar an official who is impeached for malfeasance, it should also be unnecessary to bar an official who is recalled for changing political affiliations.

Because the penalty provision is unnecessary to achieving the goals asserted by the city, and because those goals can be achieved solely through the less restrictive recall provision, the court finds that the two year penalty provision unconstitutionally burdens significant First Amendment freedoms of both voters and recalled officials.

Accordingly, IT IS HEREBY ORDERED that the plaintiffs' Motion for Declaratory Relief and Permanent Injunction is DENIED with respect to the issue of appointive positions, and GRANTED with respect to the issue of elective positions.

DATED: Honolulu, Hawaii, March 3, 1986.

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

MATSUMOTO v. PUA,
CIVIL NO. 85-0950

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR DECLARATORY AND PERMANENT INJUNCTIVE RELIEF

File Name: A-428

No. A-428 — *Republican Party of Hawaii v. Patsy Mink, et al.*

JUSTICE REHNQUIST, Circuit Justice.

Appellants, two recalled city councilmen of the city of Honolulu and the Republican Party of Hawaii, ask me to stay an order of the Supreme Court of Hawaii, or to affirmatively enjoin the conduct of appellee Pua, the city clerk of the city of Honolulu. They claim that the following provision of the Honolulu City charter violates the United States Constitution as interpreted by this Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983):

> "No person, who has been removed from his elected office or who has resigned from such an office after a recall petition directed to him has been filed, shall be eligible for election or appointment to any office of the city within two years after his removal or resignation."

Appellants Matsumoto and Paccaro were recalled in an election held October 5. They seek to run in a special election called to fill the vacancies caused by the recall which is scheduled for tomorrow, Saturday, November 30. The stay application was presented to me about 1 p.m. Eastern Standard Time today, Friday, November 29. The Court of Appeals for the Ninth Circuit concluded that the ordinance as it construed it was unconstitutional, but the Supreme Court of Hawaii has now adopted a narrowing construction, which nonetheless prevents Matsumoto and Paccaro from appearing on the ballot, and ordered the city clerk to enforce the statute in tomorrow's election.

It is almost impossible in the length of time available to me to ascertain whether four Justices of this Court would vote to note probable jurisdiction of an appeal from the decision of the Supreme Court of Hawaii, or whether a majority of this Court would be likely to reverse the decision of that court. The City Charter provision as interpreted by the Supreme Court of Hawaii is not, in my judgment, clearly unconstitutional under our decision in *Anderson v. Celebrezze, supra.* Under these circumstances, the "stay equities" of the case and the usual presumption of constitutionality accorded to state and local laws lead me to deny the application.

No. 85-1425 (3)

Supreme Court, U.S.
FILED
MAR [illegible] 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REPUBLICAN PARTY OF HAWAII, TORAKI MATSUMOTO,
AND RUDY PACARRO,
Appellants,

v.

PATSY MINK, MARILYN BORNHORST, AND
RAYMOND K. PUA, CITY CLERK,
CITY AND COUNTY OF HONOLULU,
Appellees.

On Appeal From The Supreme Court Of Hawaii

BRIEF OF THE STATE OF HAWAII AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES MINK AND BORNHORST

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QUESTIONS PRESENTED

1. Whether any substantial federal question is presented by a local ordinance that renders an elected official who is duly recalled by a majority of the voters ineligible to run in the special election to fill the vacancy created by the majority's decision?

2. Whether the filing of a timely post-judgment motion to amend a state court judgment to provide substantial new rights to one of the parties and a subsequent modification of the judgment granting the relief requested requires the filing of a new notice of appeal to perfect jurisdiction in this Court under 28 U.S.C. § 1257(2) (1982)?

3. Whether claims that city councilmen, recalled from office by a majority of the voters after having switched political parties during their terms of office, have been unconsitutionally denied an opportunity to run in a special election to fill the vacancies created by the recall are justiciable when:

(a) the councilmen were never previously recalled;

(b) the councilmen have given no indication that they desire to switch parties again in the middle of their terms;

(c) the special election has been held; and

(d) the political party from which the councilmen defected would be entitled to fill vacancies by appointment if the special election results were invalidated;

4. Whether claims that the manner in which the highest court of a state disposed of a petition for mandamus violated the Constitution

(a) have been forfeited or otherwise not preserved for review in this Court when the claimant fails to invoke an available opportunity to present such procedural claims to the state court by means of a motion for reconsideration; and, if preserved for review,

(b) present a substantial federal question when the claimant was given full and fair notice of the relief sought, and an opportunity to litigate whether the relief should be granted, and the relief granted did not exceed that prayed for?

5. Whether an appeal from a state court judgment may be employed to obtain an advisory ruling from this Court as to the *res judicata* effect of the state court judgment in proceedings in the inferior federal courts?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1425

REPUBLICAN PARTY OF HAWAII, TORAKI MATSUMOTO, AND RUDY PACARRO,

Appellants,

v.

PATSY MINK, MARILYN BORNHORST, AND
RAYMOND K. PUA, CITY CLERK,
CITY AND COUNTY OF HONOLULU,

Appellees.

On Appeal From The Supreme Court Of Hawaii

BRIEF OF THE STATE OF HAWAII AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES MINK AND BORNHORST

INTEREST OF THE AMICUS CURIAE[1]

The State of Hawaii has an abiding interest in the processes of local government in our Fiftieth State.

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[1] Although appellants note 28 U.S.C. § 2403(b) (1982) may be applicable, Juris. Stmnt. at v; Sup. Ct. R. 28.4(c), the State of

Nowhere is this more true than with respect to those chosen by the people of the largest political subdivision in Hawaii, the City and County of Honolulu.[2] In 1955, when Hawaii was still a Territory, the Legislature took the unprecedented step of delegating to the people of Oahu a central role in formulating "the organic law of the city and county." Hawaii Sen. Standing Comm. Rep. No. 696-55, *reprinted in* 1955 Hawaii Sen. J. 660. A commission was formed to draft a proposed charter for submission to the voters, Act of June 7, 1955, ch. 225, 1955 Hawaii Sess. L. 200, and, on June 14, 1958, a proposed charter was approved by the electorate. Pursuant to the terms of the Charter Commission Act, the approved proposal was submitted to the Legislature, and, with minor modifications, ratified and "enacted as law." Act of June 5, 1959 Hawaii Sess. L. 233, 234. Under the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), the charter "continue[d] in force" upon statehood several months later.

Hawaii expresses its views as *amicus curiae, see* Sup. Ct. R. 36.4, out of concern that this case is an inappropriate one for resolving whether the language employed by Congress in the Three-Judge Court Act of 1976, Pub. L. No. 94-381, 90 Stat. 1119 (1976), *codified in relevant part at* 28 U.S.C. § 2403(b) (1982), encompasses the charter provisions at issue here. *Compare Erzoznik v. City of Jacksonville,* 422 U.S. 205, 207 n.2 (1975) (local law is a "state statute" under 28 U.S.C. § 1257(2)), *with Board of Regents v. New Left Educ. Project,* 404 U.S. 541, 543 (1972) ("statute" under old Three-Judge Court Act " 'does not encompass local ordinances' " (citation omitted)). Absent a certification order, the Attorney General assumes the Court shares this concern.

[2] Oahu, where the capital, Honolulu, is located, is by far the most densely populated of the Hawaiian Islands. *See Hawaii Housing Authority v. Midkiff,* 104 S. Ct. 2321, 2325 (1984).

As originally passed by the voters, and ratified by the Legislature, the charter made no provision for recall of elected officials. The nine elected councilmen could be removed "for malfeasance, misfeasance, or nonfeasance in office," and only by the Supreme Court of Hawaii sitting as a board of impeachment. City and County of Honolulu Charter § 3-107 (1959), *reprinted in* Rev. L. Hawaii Appendix 8 at 995 (Supp. 1963). If a council member were impeached and removed, and more than a year remained in her term, a special election was to be held and the voters were to "elect a successor to fill the vacancy for the remainder of the term." *Id.* § 3-105(b), *reprinted in* Rev. L. Hawaii Appendix 8 at 994 (Supp. 1963). The charter provided that any such election would be "conducted in accordance with the election laws of the [State] insofar as applicable[.]" *Id.* §. 12-113, *reprinted in* Rev. L. Hawaii Appendix 8 at 1023.

At the general election of November 7, 1972, the citizens of Honolulu amended the charter to provide for removal of council members by recall by the electorate as well as by impeachment. Charter of the City and County of Honolulu § 11-102, *reprinted in* Hawaii Rev. Stat. ch. 70 App. (Supp. 1974), *recodified at* revised Charter of the City and County of Honolulu § 12-102 (1983 ed.), *reprinted in* App. to Juris. Stmnt. 35. The 1972 charter revisions also provided that "[n]o person who has been removed from his elected office [by recall or impeachment] shall be eligible for election or appointment to any office of the city within two years after his removal[.]" Charter of the City and County of Honolulu § 11-103, *reprinted in* Hawaii Rev. Stat. ch. 70 App. (Supp. 1974), *recodified at* Revised Charter of the City and County of Honolulu

§ 12-103 (1983 ed.), *reprinted in* App. to Juris. Stmnt. 35. The original 1959 provisions for the filling of vacancies created by impeachment were also made applicable to vacancies created by recall. Revised Charter of the City and County of Honolulu § 3-105(b), *reprinted in* App. to Juris. Stmnt. 34.

Under Hawaii law, state officials play critical roles in the recall process. Under Hawaii Rev. Stat. § 11-2 (1976), the Lieutenant Governor is designated the State's "chief election officer" and is charged with the duty of supervising elections at the state or county level. The Supreme Court of Hawaii may exercise its original jurisdiction to rule on the outcome of a close recall vote. *See Republican Party of Hawaii v. Waihee*, 709 P.2d 980, 981 (Hawaii 1985). The court may also issue mandamus relief to compel an election officer to order a disqualified candidate's name "stricken from the ballot" under Hawaii Rev. Stat. § 11-117(b) (Supp. 1984). *See Mink v. Pua*, 711 P.2d 723, 724 (Hawaii 1985).

Because the instant appeal seeks to invalidate the procedure for recall and succession adopted by the voters of the City and County of Honolulu pursuant to a charter process authorized by State law, as well as vital decisions of the Supreme Court of Hawaii implementing the recall process, the State of Hawaii has a compelling interest in this case.

OPINION BELOW

The opinion of the Supreme Court of Hawaii, *Mink v. Pua*, No. 10998, is reported at 711 P.2d 723 (Hawaii 1985).

JURISDICTION

The judgment appealed from was entered November 26, 1985, *see* Order Granting Writ of Mandamus, *Mink v. Pua*, No.10998 (Hawaii Nov. 26, 1985), App. to Juris. Stmnt. 16. Notice of appeal was filed November 27, 1985. App. to Juris. Stmnt. 19. Although jurisdiction in this Court is alleged to have been conferred by 28 U.S.C. § 1257(2) (1982), Juris. Stmnt. 3, the Court may lack jurisdiction by virtue of the filing, within the time allowed by Hawaii R. App. P. 40 (1984) for a motion for reconsideration, of a "Motion for Clarification of Decision" on November 27, 1985, and the lack of a new notice of appeal. *See F.C.C. v. League of Women Voters,* 104 S. Ct. 3106, 3114 n.10 (1984); *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-12 (1952); *infra* p. 8.

STATEMENT OF THE CASE

On October 5, 1985, George Akahane, Toraki Matsumoto, and Rudy Pacarro, three members of the Honolulu city council, were recalled from office pursuant to the provisions of the Charter of the City and County of Honolulu. Before their election as Democrats in 1982, the three recalled councilmen had pledged in writing to uphold the principles of the Democratic Party of Hawaii.[3] Perhaps sensing change

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[3] The written pledge filed by each of the councilmen with the office of the city clerk stated:

> I, __________, certify that I will qualify under the law for the office which I am seeking. I further certify that I, the candidate named herein, am a member of the Democrat Party, that I believe in the principles and policies of the

in the political winds, however,[4] the three councilmen in the spring of 1985 formally switched their party affiliation to the Republican Party. It is conceded that the former Democrats' decisions to break their pledge of party loyalty precipitated their recall.

Because of the two-year ban on a recalled council member's holding any city office, the city clerk, Raymond Pua, in performing his duties under the election laws, refused to include the names of the recalled council members on the ballot for the special election called by the city council to fill the vacancies created by the recall election. In a pending federal action, *Matsumoto v. Pua*, No. 85-0950 (D. Hawaii filed August 12, 1985), Akahane, Matsumoto, and Pacarro moved for preliminary relief declaring section 12-103's two-year ban, on which Pua relied, was unconstitutional.

The District Court, sitting en banc, denied preliminary relief, suggesting the recalled councilmen lacked

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> said Party, and that, if elected, I will, to the best of my ability, seek to carry out the provisions and pledges of the political platform of said Party, and will abide by said Party's rules and regulations.

Honolulu Star Bulletin & Advertiser at E2, col. 1-2 (Sept. 29, 1985).

[4] In the 1984 Presidential election returns for the City and County of Honolulu, President Reagan captured 56 percent of the popular vote, far exceeding his percentage in each of the other three counties of Hawaii. State of Hawaii Data Book 251 (1985). The Republican candidate for mayor received 52 percent of the vote, *id.* at 250, while the Republican candidate for county prosecutor received 73 percent of the vote, *see* State of Hawaii, Results of Votes Cast: General Election, Tuesday, November 6, 1984 at 27.5 (1985).

standing to challenge the two-year ban because (1) "[u]nder any test, a prohibition against a recalled office holder standing for election to fill the vacancy created by his recall would not violate any provision of the United States Constitution[,]" Decision and Order at 3, *Matsumoto v. Pua*, No. 85-0950 (D. Hawaii Oct. 15, 1985); (2) a state court might hold the ousted members ineligible to run in the special election even if the two-year ban were repealed, *id.* at 4; and (3) the defeated councilmen had limited their claim "to the alleged right to be candidates to succeed themselves," *id.* at 5.

On October 28, 1985, the Ninth Circuit reversed. *Matsumoto v. Pua*, 775 F.2d 1393 (9th Cir. 1985). The court resolved the standing issue by noting Pua acted solely on the basis of the two year ban, and had "expressed no view as to whether any other provision of the charter would ban such participation." *Id.* at 1396. The court also rejected the District Court's construction of the claims below, finding claims that the two-year ban would prohibit the recalled members from running not only in the special election, but also in the 1986 general elections, presented a ripe controversy. Refusing to address "the constitutionality of a limited ban against recalled office holders running to fill the vacancies created by their own recall," *id.* at 1397, the court found the ex-councilmen would likely prevail on their attack on a two-year ban, and ordered relief accordingly, *id.* at 1397-98.

On November 20, 1985, two Democratic council members, Patsy Mink and Marilyn Bornhorst, commenced proceedings in the Supreme Court of Hawaii to resolve the issue left open by the Ninth Circuit by mandamus relief holding Matsumoto and Pacarro "ineligible to fill by special election the unexpired portions of terms from which they were recalled." Emergency Petition for Writ of Mandamus at 2, *Mink v. Pua*, No. 10998 (Hawaii Nov. 20, 1985). Mink and Bornhorst also moved for *ex parte* relief, but that motion was denied, Order Denying Motion for a Temporary Restraining Order, *Mink v. Pua*, No. 10998 (Hawaii Nov. 20, 1985), and the court set the case for expedited briefing and argument. Order For Issuance of Summons, *Mink v. Pua*, No. 10998 (Hawaii Nov. 20, 1985). Respondents below, (Matsumoto, Pacarro, and Pua) were all duly served with notice of the hearing by 9:22 a.m. on November 21, and, on November 25, 1986, the Republican Party of Hawaii was permitted to intervene, Order Granting Motion to Intervene, *Mink v. Pua*, No. 10998 (Hawaii Nov. 25, 1985).

Following argument on November 26, the Supreme Court of Hawaii ordered Matsumoto and Pacarro disqualified from running in the special election scheduled for November 30, 1985, and required Pua to "take appropriate action with respect to said disqualifications." Order Granting Writ of Mandamus, *Mink v. Pua*, No. 10998 (Nov. 26, 1985). Appellants here filed their notice of appeal on November 27, 1985, at 4:21 p.m. Minutes later Pua moved for "clarification" of the court's November 26 decision, in part because the court had overlooked Hawaii Rev. Stat. § 11-118 (Supp. 1984), which entitled the Republican Party to name substitute candidates. Motion for Clarification at 3, *Mink v. Pua*, No. 10988 (Hawaii Nov. 27, 1985). Simultaneously, appellants requested Justice Rehnquist, as Circuit Justice, to stay the court's November 26 order.

Although urged to let the election go forward, after argument on November 29 the court moved the election to December 28. Order on Motion for Clarification, *Mink v. Pua*, No. 10998 (Hawaii Nov. 29, 1985). That same day, Justice Rehnquist denied the application for stay, *Republican Party of Hawaii v. Mink*, 106 S.Ct. 422 (1985), noting that a construction of the city charter "which prevents Matsumoto and Paccaro from appearing on the ballot" was not "clearly unconstitutional." *Id.* On December 4, 1985, the Supreme Court of Hawaii filed an opinion explaining its November 26 order. *Mink v. Pua*, 711 P.2d 723 (Hawaii 1985). Appellants neither filed a new notice of appeal, nor moved for reconsideration under Hawaii R. App. P. 40 (1984).

ARGUMENT

This appeal should be dismissed. First, appellants' points of error do not present any substantial federal question. Second, and just as important, appellants' claims are riddled with procedural defects.

I. The Appeal Presents No Substantial Federal Question.

It is well settled that the states "have a legitimate interest in ensuring that governmental processes are not disrupted by vacancies and have wide latitude in devising a method to fill those vacancies promptly." *Lynch v. Illinois State Board of Elections*, 682 F.2d 93, 97 (7th Cir. 1982) (citing *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982)). As the Supreme Court of Hawaii noted, permitting a recalled member to run in the special election required by law within sixty days of recall would risk delaying ad infinitum the process of filling a vacancy since a recalled member could be re-elected by a plurality only to be recalled again by a majority "several times during the second and third years of a councilman's four-year term." *Mink v. Pua*, 711 P.2d at 726. In the words of the United States District Court, "[u]nder any test, a prohibition against a recalled office holder standing for election to fill the vacancy created by his recall would not violate any provision of the United States Constitution[,]" Decision and Order at 3, *Matsumoto v. Pua*, No. 85-0950 (D. Hawaii Oct. 15, 1985), *rev'd on other grounds*, 775 F.2d 1393 (9th Cir. 1985).

Indeed, eight members of this Court have explicitly endorsed the view that the states may enact "restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values." *Anderson v. Celebrezze*, 460 U.S. 780, 789 n.9 (1983) (Stevens, J., joined by Burger, C.J., Brennan, Marshall, and Blackmun, JJ.) (citing *Clements v. Fashing*, 457 U.S. 957 (1982) (Burger, C.J., Powell, Rehnquist, Stevens, and O'Connor, JJ., in the majority)). Surely it is legitimate, and unrelated to First Amendment values, for a state to provide reasonable incentives to ensure "a legislator will vote with due regard to the views of his constituents." *Clements*, 457 U.S. at 968 (plurality opinion). As Justice Stevens aptly stated in his concurring opinion in *Clements*, there is no federal interest "in requiring a State to define the benefits and burdens of different elective state offices in any particular manner." 457 U.S. at 974.

Here the people of the City and County of Honolulu have done nothing more than impose a reasonable "burden," *id.*, on the office of city councilman designed to ensure that the elected holder of that office "will vote with due regard to the views of his constitutents." 457 U.S. at 968 (plurality opinion): Those who so defy their constituents that they are recalled by majority vote are disabled from running in the special election to fill the vacancy created by their own inattention to constituents concerns. *See Mink v. Pua*, 711 P.2d at 726.

No serious claim can be made that preventing the three individuals recalled for their party switch from running in the special election discriminated "against those candidates and . . . against those voters whose political preferences lie outside the existing political parties." *Anderson v. Celebrezze*, 460 U.S. at 794. None of the three ex-councilmen sought to run as independents. Rather, they wished to run as *Republicans*.[5] Even if one makes the patently absurd assumption that the Republican Party, which captured fifty-six percent of the 1984 Oahu vote for President, fifty-two percent of the 1984 vote for mayor of Honolulu, and seventy-three percent of the 1984 vote for Honolulu county prosecutor, "is a minor party in Hawaii," Juris. Stmnt. at 4, that party, on the basis of Pua's post-judgment motion, was allowed ample time to field candidates in the special election. Order for Motion for Clarification, *Mink v. Pua*, No. 10998 (Hawaii Nov. 29, 1985). Given the additional fact that the ballot limitation here has nothing to do with "a nationwide electoral process[,]" *Anderson v. Celebrezze*, 460 U.S. at 785, it is obvious no First Amendment interests have been abridged. Appellants' substantive constitutional claims[6] are without merit.

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[5] Appellant Republican Party of Hawaii acknowledged Pacarro's and Matsumoto's Republican candidacies in demanding the right to name alternative candidates under Hawaii Rev. Stat. § 11-118. *See* Memorandum in Support of Motion to Intervene at 2, *Mink v. Pua*, No. 10998 (Hawaii Nov. 25, 1985).

II The Appeal is Riddled With Procedural Defects.

Contrary to appellants' assertion that the claims here are presented "in as pure and clean a factual and procedural context as possible," Juris. Stmnt. at 23, the instant appeal suffers numerous defects.

First, the notice of appeal became a nullity when appellee Pua moved for modification of the state court's November 26 order. Under this Court's decisions, the time in which appeal must be taken "run[s] anew," *F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-12 (1952), when a lower court "changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered[,]" *id.* at 211. Even the *filing* of a timely motion for rehearing requires a new notice of appeal. *Ohio Public Service Co. v. Ohio ex rel. Fritz*, 274 U.S. 12, 13 (1927). Here the state court, in response to a "Motion for Clarification" filed within the time for reconsideration under

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[6] Appellants' procedural objections, which rely on *Blinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930), are equally groundless. The petition for mandamus below specified the relief sought—disqualification of Matsumoto and Pacarro—and the relief granted did not exceed that demanded. Appellants had a full opportunity to litigate the relief requested. That is all *Brinkerhoff* requires. *Id.* at 681. To credit the procedural claims, even if factually true, this Court would have to hold state courts constitutionally disabled from disposing a case on a ground not raised by the parties. *But see Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982).

Hawaii R. App. P. 40 (1984), materially altered the rights of appellant Republican Party of Hawaii to field candidates in the special election. *Cf. F.C.C. v. League of Women Voters*, 104 S. Ct. 3106, 3114 n.10 (1984) (appeal is timely if postjudgment motion is directed to a "wholly collateral issue"). The "policy that statutes authorizing appeals [to this Court] are to be strictly construed," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 & n.10 (1984), requires dismissal of the appeal.[7]

Second, insofar as state law would require any council vacancy occurring this late in the term to be filled by appointment, not by special election, *see* Order on Motion for Clarification, *Mink v. Pua*, No. 10998 (Hawaii Nov. 29, 1985),[8] no effective remedy could be given, even if this Court enjoyed the power, *but see Mills v. Green*, 159 U.S. 651 (1895), to void the election that ultimately occurred on December 28, 1985. Even appellants thus recognize that to escape the conclusion that this case "is classically 'moot[,]' " *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 71 (1984) (per curiam), they must shoehorn their claims into the exception for cases " 'capable of repetition, yet evading review[,]' " Juris. Stmnt. at 22 (citation omitted).

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[7] Thus, even if the Court would apply the old rule for appeals under 28 U.S.C. § 1291, *see Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982) (per curiam), to cases under the exception to this policy, 28 U.S.C. § 1252 (1982), dismissal would still be warranted. *F.C.C. v. League of Women Voters*, 104 S. Ct. 3106 (1984), however, suggests a premature notice filed even in a § 1252 case would be rendered void by filing of a timely motion for amendment of judgment on a "non-collateral" issue. *See id.* at 3114 n.10. If this is so, dismissal is required a fortiori. *See Silkwood*, 464 U.S. at 247-48 & n.10.

[8] That appointment would be made by the remaining council majority, *see* App. to Juris. Stmnt. 33, which is controlled by the Democratic Party, Juris. Stmnt. 5.

Appellants cannot accomplish this feat. This Court has repeatedly held that to come within the exception "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). A "mere physical or theoretical possibility [of repetition,]" *id.* is not sufficient. In order for the "same controversy" to be repeated, appellants must make the farfetched assumption that Pacarro and Matsumoto will again run in a general election, will win again, will again switch parties, and will again be recalled.[9] Even if proving mootness is appellees' burden, *Firefighters v. Stotts*, 104 S. Ct. 2576, 2583 (1984), that burden has been carried. For switching parties in the middle of a term, Matsumoto and Pacarro were ousted from office. "It is not likely that the parties to this dispute will forget this lesson." *Jefferson v. Abrams*, 747 F.2d 94, 97 (2d Cir. 1984). There is "no reason to believe," *Murphy*, 455 U.S. at 458, that "the questions before the Court are certain to be central to future proceedings[.]" *National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 462 U.S. 810, 820 n.14 (1983).

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[9] This position and Justice Padgett's analysis of the reasons for the ineligibility of recalled council members for the special election, *Mink v. Pua*, 711 P.2d at 726, are thus consistent. To the extent the factual predicates for a justiciable controvesy are at all present, however, Justice Padgett's view of the merits is even more compelling.

Third, appellants failed to raise many if not all of their constitutional claims in the state court, notwithstanding that a motion for reconsideration under Hawaii R. App. P. 40 provided an avenue for doing so.[10] As was noted recently, "the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review[,]" *Heath v. Alabama*, 106 S. Ct. 433, 437 (1985). Because failure to raise claims by means of a Rule 40 motion bars further litigation in state court, *Robinson v. Ariyoshi*, 65 Hawaii 641, 662, 658 P.2d 287, 302-03 (1982), the claims raised for the first time in this Court have been forfeited, *Orr v. Orr*, 440 U.S. 268, 275 n.4 (1979)

Finally, whether the state court's decision is preclusive in proceedings in the federal courts is simply not cognizable on this appeal, at least as long as this

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[10] Rule 40, Hawaii R. App. P. (1984), provides, in pertinent part:

> Rule 40. Motion for Reconsideration.
>
> (a) Time. A motion for reconsideration may be filed by a party only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a judge or justice of the appellate court involved.

Although Matsumoto and Pacarro asserted granting the writ below "would violate the First and Fourteenth amendments of the U.S. Constitution[,]" Memorandum in Support of Motion to Dismiss Emergency Petition 3, *Mink v. Pua*, No. 10998 (Hawaii Nov. 25, 1985), and the state court did rule on that issue, the points raised by the first three "Questions Presented" of the Jurisdictional Statement, which, absent plain error, are the only points at issue here, Sup. Ct. R. 15.1(a), are all addressed to the reasoning of the state court's December 4 opinion. None of *these* issues were raised in state court.

Court's appellate jurisdiction is limited to the "controversies" presented by the case actually on appeal. *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see Colorado v. Nunez*, 465 U.S. 324, 329 (1984) (Stevens, J., dissenting).[11]

CONCLUSION

Although it may be wise for this Court "to flesh out its holding in *Anderson v. Celebrezze*, 460 U.S. 780 (1983)," Juris. Stmnt. 24, of all the cases on the Court's appellate docket, *see, e.g., Socialist Workers Party v. Washington*, 765 F.2d 1417 (9th Cir. 1985), *prob. juris. noted*, 106 S. Ct. 783 (1986), this one is not the proper vehicle for doing so. The federal questions presented are wholly insubstantial, and the appeal is beset by numerous procedural defects. For these reasons, the State of Hawaii urges that the appeal be dismissed.

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[11] Although a state court's failure to give preclusive effect to a federal court decision is cognizable in this Court, *cf. Parsons Steel, Inc. v. First Alabama Bank*, 106 S. Ct. 768, 773 (1986) (review by certiorari only), any preclusion claim preserved for review, *see supra* note, is meritless. Given the Ninth Circuit's explicit refusal to rule on the issue decided by the Supreme Court of Hawaii, the predicates for upsetting the judgment here on the basis of *Matsumoto v. Pua*, 775 F.2d 1393 (9th Cir. 1985), do not exist. *See generally Migra v. Warren City School Dist.*, 465 U.S. 75, 77 n.1 (1984).

Respectfully submitted,

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